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REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF KING's BENCH,

TOGETHER WITH SOME OTHER CASES,

IN MICHAELMAS, HILARY, EASTER, AND TRINITY TERMS,

BEING THE WHOLE OF THE FORTY-SIXTH YEAR OF THE REIGN OF GEORGE III. (1805 AND 1806).

WITH

TABLES OF THE NAMES OF THE CASES AND OF THE PRINCIPAL MATTERS.

BY JOHN PRINCE SMITH, ESQ.

OF GRAY's INN, BARRISTER AT LAW.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN MICH. TERM,

In 46 Geo. III.

LANE *against* COBHAM and Another.—*Nov.* 8.

Where several districts of a parish lying in several counties, by agreement, unite in appointing overseers for upwards of 30 *years, a rate made for the whole parish will be valid, they having substantially the benefit of the* 43 Eliz. c. 2.

Poor Rate. Stat. 43 Eliz. c. 2: 13 & 14 C.II. c. 12, s. 21. United Parishes.

1805.

LANE versus COBHAM and another.

THIS was an action of *trespass* tried at *Salisbury*, last summer assizes, before GRAHAM, *B.* when a verdict was had for the *defendants*. The whole case turned upon the validity of a rate for the relief of the poor of the parish of *Wokingham*, which was made generally for the whole of the parish, and whether such rate was valid for the town and parish of *Wokingham*, *Berks* and *Wilts*; it being contended that the *Wiltshire* liberty should be rated separately. From *time whereof*, &c. until the year 1772, the parish of *Wokingham* consisted of three parts; the one part being the *vill* or borough, the other that part of the parish of *Wokingham* which lies in the county of *Berks*, and the third, that part which lies in the county of *Wilts*. Up to 1773, there were four overseers, and four constables, for the distinct parts, and the rates also were distinct. In 1773, two parts came to a resolution to unite,

1805.

LANE *versus* COBHAM and another.

namely, that part of the town of *Wokingham* which lies in *Berkshire*, and that part of the parish which is in *Wilts*. These united together, and made one general rate for the two parts, and also desired the third part to join, but the inhabitants thereof refused to do so until the year 1775; when in consequence of a *mandamus* to elect overseers for the whole parish they complied; but this *mandamus* was obtained upon consent or fraudulent collusion, without cause shewn, and was not deemed material by the learned judge. The *counsel* for the *plaintiff* contended that the agreement entered into by the three districts of the parish, could not alter the ancient constitution of the parish. And it was shewn, that the town, and the *Berkshire* district, in alternate years, elected two overseers out of their separate districts.

The learned judge said, that he thought the agreement between the districts was binding upon the whole parish as it brought back the parishes upon the ancient law of the 43 *Eliz.* c. 2; and the jury thereupon found a verdict for the *defendants*.

LENS, Serjt. and EAST was with him, moved for a rule to shew cause why there should not be a new trial on the ground of a misdirection of the judge, in this respect, and contended, that the stat. 13 and 14 *Car.* II. c. 12, § 21, was imperative, that "where by reason of the largeness of the parishes, the inhabitants cannot have the benefit of the 43 of *Eliz.* all and every the poor within every township or village shall be maintained within the several townships and villages where they shall inhabit, or wherein they were last lawfully settled, and there shall be yearly chosen two or more overseers within every of the said townships or villages respectively."*

Lord ELLENBOROUGH, C. J. "The learned judge did not probably state his direction without some qua-

*He cited *Rex* v. *Leigh*, 3 *Term Rep.* 746.

lification,* and it appears they have had, and, therefore, *could* have the benefit of the 43 *Eliz.* in the best manner possible, by electing overseers alternately for the whole parish. If I saw that they could not have the benefit of that act in any substantial manner, I should lay hold of something in order to continue or revive the old constitution of the parish; but from the year 1775, I think they have had the benefit of the 43 of *Eliz.* c. 2, and therefore I do not think that the verdict should be disturbed."

1805.

LANE *versus* COBHAM and another.

RULE to shew cause refused.

M'COMBIE *against* DAVIES.—*Nov.* 11.

Where a factor, having a lien upon goods, pledges them to his creditor for a debt without notice of such lien, and without any express intention, at the time, of making the lien the subject of pledge, the pawnee of the goods cannot take advantage of this lien, in defence to an action of trover at the suit of the owner.

Factor. Lien. Trover.

Semble aliter, *if the lien is expressly transferred to the pawnee, and the claim made on that account merely.*

THIS case was before the court on a former occasion, when a new trial was granted upon the following case:*

M'COMBIE *versus* DAVIES.

This action was tried at *Guildhall*, in the sittings after *Michaelmas* term, 1804, the *plaintiff* was nonsuited by direction of the *Lord Chief Justice*, who tried the cause, on the ground that there was no conversion

* By the brief for the *plaintiff*, it appears that *Graham* B. relied on the circumstance of the usage for 30 years, shewing that the parish could have the benefit of the 43 *Eliz.* c. 2. But it was also there stated, that the *defendant* admitted that the several overseers now act separately for their separate districts only. The jury found expressly, that until 1773 and 1775 each division maintained its poor separately.

* See *Smith's Reports*, Vol. 2. p. 557.

1805.

M'COMBIE *versus* DAVIES.

by the *defendant*; a motion was made in *Hilary* term last to set aside the nonsuit, and for a new trial, and the opinion of the court was reserved upon the following facts;

That the *plaintiff* was a merchant in *Aberdeen*, and had employed a Mr. *James Rowland Coddan*, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase him some tobacco, which he accordingly did; that the tobacco, the subject of the action, was part of that tobacco; but the *defendant* had no knowledge of the transaction between the *plaintiff* and *Coddan*. That *Coddan* the broker, bought the tobacco in his own name, and whilst it was in the king's warehouses, and had it transferred to him, in his own name, in the king's warehouses, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouses. That *Coddan*, being in want of money, pledged the *tobacco* in his own name with the *defendant*, for a sum of money, and transferred it into the *defendant*'s name in the king's warehouses.

Afterwards an application was made to the *defendant* on the part of the *plaintiff*, for a delivery of the tobacco in question; the *defendant*'s answer was, that he had advanced money to *Coddan* thereon, that he did not know *M'Combie*, and could not transfer them but to *Coddan*'s order, and not till his advances were paid. That on the 6th and 7th of *November*, the following orders were addressed to the *defendant*.

"B. A.—237—L. 649—597—659—508.

"MR. DAVIES,

"Sir—Please to deliver to the order of Mr. *Thomas M'Combie*, the above five hogsheads of tobacco, his property.

Your most obedient servant,

JAMES ROWLAND CODDAN."

"Mr. SOLOMON DAVIES.—Sir—I have to request you will

immediately deliver to me five hogsheads of tobacco, marked and numbered as below, the same being my property, and placed in your hands by my broker, *James Rowland Coddan*, whose order for their delivery I now hand you, and have to observe, that if you do not deliver them over to me, I shall be under the necessity of entering an action against you to enforce their delivery. I am Sir, your obedient servant,

THOMAS M'COMBIE.

B. A.—No. 237—L. 649—597—659—508."

That the *defendant* received the said orders; but said, that he should not deliver the tobacco, until he was paid the money that he advanced to *Coddan*; that the tobacco still remains in the king's warehouses, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the *defendant*.

This case was accordingly tried again, at the sittings after last *Trinity* term, before Lord ELLENBOROUGH, C. J. in *London*; when it appeared that *Coddan*, the factor, who had pledged the tobacco to the *defendant*, had a lien on the goods for 30l. for money due to him. It was therefore contended that *Coddan* having transferred his right to the *defendant*, the *plaintiff* was not entitled to recover without having previously paid or tendered the 30l. the subject of *Coddan*'s lien; but his lordship held, that the factor could not transfer the lien by the tortious act of pledging.

The SOLICITOR GENERAL now moved for a new trial upon the ground that the possession of *Davies* was the possession of *Coddan*, and that the same lien which *Coddan* had, the *defendant* might have also; for this purpose he cited *Daubigny* v. *Duval*, 5 *T. Rep.* 504.

Lord ELLENBOROUGH, C. J. "Lord *Kenyon* said, in the case of *Sweet* v. *Pym*, 1 *East* 4, that the right of lien has never been carried further than while the goods are in the possession of the person who is entitled to the original lien, in the possession of the par-

1806.

M'Combie versus Davies.

ties themselves. I cannot consider the possession of the *defendant* as the possession of *Coddan* with respect to the legal rights subsisting between the *plaintiff* and *Coddan*, because the goods were transferred to him by a tortious act."

Afterwards, his lordship added, that the opinion of Lord *Kenyon*, in the case of *Daubigny* v. *Duval*, as far as it was applicable to this case, seemed to have been changed when he decided that of *Sweet* v. *Pym*. He hoped, however, that it would not be understood that he meant to say that a person who is entitled to a lien upon certain goods, may not commit the possession of them to another as his servant, with notice of the lien, and may not transfer, to such person, the right to insist upon the lien; his observation applied only to a tortious transfer of the possession. As if the factor had delivered the goods to the *defendant*, with notice of his lien, and desired him to keep them as his security for the amount of the lien; but here was nothing of this kind.

RULE NISI REFUSED.

DOE on the Demise of VERNON *against* VERNON.—*November* 13.

Copyhold. Legal Estate. Admission. Ejectment.

A. devised customary or copyhold estates to B. and his heirs in tail male, and remainder over to C. his daughter in tail. A. makes a surrender to the use of his will. B. enters and dies without admittance, and, living B., C. devises the remainder in the premises to D. her second son, in fee, subject to several charges, and afterwards dies living B. without surrendering to the use of her will, and without being admitted. There is a custom for reversioners or tenants in remainder, not in possession, to be admitted upon payment of half fines, and to surrender to the use of their wills. D. the devisee of C. and her heir at law, are both admitted as tenants, and F. is in possession. Held, that at law, B. the devisee, cannot maintain ejectment, the admission of D. not being capable

1805.

Doe dem. Vernon versus Vernon.

of being connected with the surrender of A. to the use of his will.

Semble. D. has an equitable interest, and F. may be a trustee for D. and a court of equity may compel him to surrender; but D. has no legal estate, nor any remedy at law.

THIS was an action of *ejectment* brought for the recovery of certain customary tenements in the parish of *Wakefield* and county of *York*. The cause came on to be tried at the assizes for the county of *York*, held on the 9th day of *March*, 1805, before Mr. Baron *Graham*, when a verdict was taken for the *plaintiff*, subject to the opinion of the court on the following case:

Thomas, Earl of *Strafford*, being seised to him and his heirs, according to the custom of the manor, of (amongst others) the tenements mentioned in the declaration; which are customary tenements, holden of the manor of *Wakefield*, by copy of court-roll, by rents and services, according to the custom of the manor, and pass by surrender and admittance, paying on admittance thereto, some of them compounded or certain fines, and others of them uncompounded or arbitrary fines, to the lord; on the 10th of *April*, 1732, according to the custom of the manor, made the following surrender of these customary tenements with the appurtenances, to the use of his will: "At this court it was witnessed, upon the oath of *Benjamin Sigston*, a tenant of the lord, that the Right Hon. *Thomas* Earl of *Strafford*, the 10th day of *April*, 1732, did surrender into the hands of the lord of the said manor, by his hands, all and singular the messuages, dwelling houses, cottages, closes, lands, tenements, and hereditaments whatsoever, with their and every of their appurtenances, situate, lying, and being in *Wakefield*, *Stanley*, *Alverthorpe*, *Thorns*, and *Sandal Magna*, or elsewhere within the said manor of *Wakefield*, which the said earl now holds of the lord of the said manor of *Wakefield*, by copy of court-roll, in whose tenures or occu-

1805.

Doe dem. VERNON versus VERNON.

pations soever the same now are or be, being of the yearly rent to the lord in the whole, of 4l. 10s. 8¾d. and compounded for; to and for such use and uses, intents and purposes, and upon such trusts and limitations, and under such powers and authorities as are or shall be limited, expressed, or declared, in or by the last will and testament, in writing, of him the said earl, and to and for no other use, intent, or purpose whatsoever. The whole of the lord's rents paid for customary tenements of the said earl, holden of the said manor, amounted at the time of the said surrender of the said earl to 4l. 18s. 1½d.; part thereof, to wit, 2l. 11s. 5d. being for the compounded, and 2l. 6s. 8½d. the residue thereof, being for the uncompounded part of the customary tenements. The said earl, on the 22d day of *June*, 1732, by his will of that date, duly executed, after specially devising several estates to be held in tail, made the following general residuary devise of his other estate, including the said customary tenements, holden of the manor of *Wakefield* as aforesaid, which he had so surrendered to the use of his will. "And as to all others my manors, messuages, lands, tenements and hereditaments, whatsoever and wheresoever, either freehold or copyhold (except those in the said counties of *York*, *Lincoln*, and *Nottingham*, which I have already disposed of by my will as aforesaid) subject to the said several rents-charge of 2000*l.* and 200*l.* *per annum*, and such devises thereof as aforesaid; and the legacies by this my will or by any codicil which I shall hereafter make, I give and bequeath the same, in failure of issue male of the body of my son *William* Lord *Wentworth*, and of my own body, to my said three daughters, Lady *Anne*, Lady *Lucy*, and Lady *Harriet*, and their heirs, equally to be divided between them, as tenants in common, and not as joint-tenants." The said testator died in *November*, 1739, without altering or revoking his said will, and leaving his only son, the said *William* Earl of

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Strafford, and his said three daughters him surviving. *William* Earl of *Strafford*, on the death of his father Earl *Thomas*, entered into the said customary tenements, and enjoyed the same till his death without issue in 1791; but was never admitted thereto, unless as may be from what is hereafter stated. Lady *Harriet Vernon*, one of the daughters of the said Earl *Thomas*, on the 20th day of *April*, 1779, and whilst she was a widow, by her will of that date duly executed, devised as follows: "Whereas under or by virtue of the last will and testament of my late father the Earl of *Strafford* deceased, I am or shall be entitled, upon the contingencies therein mentioned, to the fee-simple of and in one undivided third or some other part or share of divers manors, messuages, lands, tenements, and hereditaments in the several counties of *York*, *Lincoln*, *Nottingham*, *Northampton*, *Bedford*, *Suffolk*, and *Middlesex*, or elsewhere: now I do hereby give and devise all my estate, right, title, share, and interest, of, in, and to the said several manors, messuages, lands, tenements, and hereditaments, of what nature or kind soever, and wheresoever situate or being, unto and to the use of my son *Leveson Vernon*, his heirs and assigns for ever, but subject, nevertheless, to, and I do hereby charge the same estates with, the payment of 2500*l.* from and immediately after my said son *Leveson Vernon*, his heirs or assigns, shall come into possession thereof, such sum of 2500*l.* to be paid as therein directed." And after bequeathing several specific legacies, she devised as follows: "And all the rest, residue, and remainder of my estates, real and personal, of what nature or kind soever, goods, chattels, and effects, I give, devise, and bequeath to my son, *Leveson Vernon*, his heirs, executors, and administrators." And the said Lady *Harriet*, afterwards, on the 15th day of *July*, 1779, by her codicil of that date duly executed, devised as follows: "Whereas since the

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making of the foregoing will, I am become seised of or entitled to sundry manors, messuages, lands, tenements, hereditaments, in the counties of *Northampton* and *Bucks*, devised to me by *Elizabeth Tordiffe*, widow, lately deceased; I do hereby give and devise all and singular the said estates, and all and every my right, title, and interest therein and thereto, unto and to the use of my son, *Leveson Vernon*, his heirs and assigns for ever, charged and chargeable nevertheless with the payment of several annuities as therein mentioned; and I do hereby confirm my foregoing will in all respects, and declare this to be a codicil thereto." The said Lady *Harriet* never surrendered the said customary tenements to the use of her will, nor was she or any other person (except as after mentioned,) ever admitted to the same, subsequent to the death of the said Earl *Thomas*. The said Lady *Harriet* died in 1786, without altering or revoking her said will or codicil, leaving two sons her surviving, viz. *Henry Vernon*, Esq. the *defendant*, her eldest son, and *Leveson Vernon*, Esq. the lessor of the *plaintiff*, and devisee named in her will, her youngest son. On the death of the said *William*, Earl of *Strafford*, son of Earl *Thomas*, considerable freehold estates in the counties of *Northampton*, *Suffolk*, *Middlesex*, and *Kent*, came into the possession of the descendants of the aforesaid three daughters of Earl *Thomas*, on failure of his and his sons' issue male, by virtue of the aforesaid residuary devise in his will, and the lessor of the *plaintiff*, *Leveson Vernon*, Esq. by virtue of the will of his mother, the said Lady *Harriet*, became entitled to one third part thereof, and has ever since enjoyed the same; but the said Lady *Harriet* was not at the time of making her said will, or at the time of her death, seised of or entitled under or by virtue of the will of her said father, *Thomas* Earl of *Strafford*, to any devisable estate or interest of or in any freehold premises, or any other pre-

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mises in the county of *York*, other than such estate or interest as she was entitled to (if any,) in the aforesaid customary tenements, under and by virtue of the aforesaid residuary devise of the said *Thomas* Earl of *Strafford*. The *defendant, Henry Vernon*, Esq. son of the said Lady *Harriet*, is customary heir of the tenements in question, which are of the nature of compounded and uncompounded customary tenements, and part of the said customary tenements holden as aforesaid of the said manor of *Wakefield*, whereof Earl *Thomas* was seised as aforesaid, at the time of making the said surrender, and at his death. It has been usual within the said manor for persons entitled to reversionary interests in customary lands holden of the said manor, and desirous to dispose thereof by will, or in mortgage, or otherwise to be admitted to such reversionary interests; and upon such admittances to estates not in possession for the steward to assess a half fine, and such persons when so admitted have surrendered the same to the uses of their wills, and upon the inrolments of such surrenders for no fine to be paid; and no instance has been found of any admittance of persons claiming under wills, without a previous surrender to the use of such wills. The lessor of the *plaintiff* has been admitted to the tenements in question, and so has the *defendant, Henry Vernon*, Esq. who is in possession thereof as landlord, and the other *defendants* are his tenants. Question, Is the lessor of the *plaintiff* entitled to recover all or any part, and which of such customary tenements? It is agreed that this special case shall be turned into a special verdict at the request of either party, or the court.

First; That a sum of 4l. 14s. 6d. was annually paid by *William* Earl of *Strafford*, as customary or lord's rent for these customary lands, held of the manor of *Wakefield*, from the death of his father, Earl *Thomas*, until the same was discontinued as hereinafter men-

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tioned. The amount of such rents in the lord's books is 4l. 18s. 1½d. but Earl *William* never paid more than the above sum of 4l. 14s. 6d. The receipts of the customary or lord's rent are entered in a book distinct from the court rolls, and never appear upon the rolls. Second; That Earl *William* does not appear by the court rolls to have been ever admitted, but was frequently applied to by the lord, and by his steward to come in and be admitted, which he did not do; but in the year 1779 the lord insisting upon the said Earl *William*'s coming in to be admitted, and to pay his fines, the payment of the above sum, 4l. 14s. 6d. was discontinued, and in 1791 the lord filed his bill in Chancery against *Frederic Thomas*, Earl of *Strafford*, to whom the estate had then descended, and the customary heirs of *William* Earl of *Strafford*, to compel the party entitled to the lands to come in and be admitted thereto, and that the lord's fines should be paid, which suit is still depending. Third; The surrender of Earl *Thomas* to the uses of his will was presented in court in 1741, after his death, according to the custom of the manor, but his will was never enrolled until the year 1802, when Mr. *Conolly* was admitted tenant to the compounded part of the customary tenements under a writ of *mandamus*.

WATKINS, for the *plaintiff*, made two questions; first, whether Lady *Harriet Vernon*, at the time of making her will, and also at the time of her death, had such an interest in the premises in question, as she could have devised by her will, without a previous surrender to the use of her will. And secondly, whether, if she had such an interest, she made use of such words in her will as were sufficient to pass it. As to the surrender of a copyhold, the surrenderee is not invested with the tenancy, but by the admission of the lord. No one is tenant until admission, except an heir

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upon a descent.* And if a copyholder surrenders to the use of the surrenderee and his heirs, the estate remains in the surrenderor till admittance.† So in case of a devise.‡ It is stated in this case, that *Thomas* Earl of *Strafford* surrendered to the use of his will, and there was no admission by the devisee under his will, till after the death of Lady *Harriet Vernon*. Therefore, on the death of *Thomas* Earl of *Strafford* the estate must have descended to his customary heir; and as Earl *William*, one of the devisees, survived Lady *Harriet Vernon*, the legal estate in the premises was not in her ladyship, and she had only an equitable interest. A legal estate in a copyhold is not devisable at all, but by means of a surrender to the use of the will, but such surrender cannot be made by a person who has not the legal estate by admission; and therefore such a person may without a surrender, devise the equitable estate. As, where there is a mortgage, the mortgagor not having the legal estate in him, has no estate that he can surrender, and therefore may devise the copyhold premises without a surrender.§

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* *Co. Cop.* 38, 1. p. 87; 1 *Term Rep.* 395; 1 *Rol. Abr.* 502; pl. 34; *Cro. Eliz.* 349; *Preced. Chancery*, 573; *Roe de Jeffries* v. *Hicsk*, 2 *Wilson* 13; *Atkins* v. *Atkins*, 5 *Burr.* 2764;

† *Sir H. Peachy* v. *the Duke of Somerset. Preced. in Chanc.* 568, *Str.* 454.

‡ *Doe d. Shewen* v. *Wroots*, 5 *East*, 137; *Perry* v. *Whitehead*, 6 *Vesey, Jun.* 544; *Kennebel* v. *Scrafton*, 8 *Vesey, Jun.* 30; *Semayne's* case, 1 *Buls.* 200; *Attorney-General* v. *Andrews*, 1 *Ves.* 225; *Duke of Manchester* v. *Lord Godolphin*, 2 *Vesey*, 77.

§ *Strudwicke* v. *Strudwicke*, *Pasch.* 1720; *Greenhill* v. *Greenhill*, 2 *Vern.* 680; *Tuffnell* v. *Page*, 2 *Atk.* 37; and *King* v. *King*, 3 *P. Williams*, 360.

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Lord ELLENBOROUGH, C. J. "Are there any cases where this court or any court of law has taken notice of an equitable estate?"

WATKINS. "As by the admission of the lessor of the *plaintiff*, the equitable estate is now become a legal estate, a court of law may take notice of it."

LAWRENCE, J. "The legal estate may, perhaps, be in the heir at law of *Thomas*, Earl of *Strofford*, and he may be a trustee for the heir at law of Lady *Harriet Vernon*. Then must not he go into a court of equity? In what a state of confusion would copyhold titles be, if, when it appears that there is an admission on a surrender to one person, there should be a legal estate set up under a will of which nothing appears?"

Lord ELLENBOROUGH, C. J. "Really as a question of law there is nothing in it. Here is a devise by Lady *Harriet Vernon*, which Lady *Harriet Vernon* was never admitted, and there is a negative custom that the devisee cannot be admitted under the will till after a surrender to the use of the will. We are then to be hunting after an equitable interest, when we have nothing to do with the equity."

WATKINS. "The custom goes only to the legal estate. When she devised it, she had only an equitable interest, to which the custom therefore could not apply. She would also be entitled to admittance as surrenderee."

Lord ELLENBOROUGH, C. J. "It only clothes her with a formal legal title, and no more. Now nobody, as her heir, can be in a better situation than she would be herself, and she was never in fact admitted. It would only be oversetting all the copyhold law as it stands at present, to hold the legal estate to be in the lessor of the *plaintiff*. And how could the admittance of the devisee of Lady *Harriet Vernon* connect itself with the

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surrender of Earl *Thomas*, whose will directed the uses of *that* surrender. The only surrender is under the will of Earl *Thomas*. Surely, the proper view of the case is, that the heir at law of Earl *Thomas* is a trustee for the heir at law of Lady *Harriet*, and a court of equity will direct that the heir at law shall make a surrender. I cannot think that the admittance of the devisee under the will of Lady *Harriet* can be connected with the surrender to the use of Earl *Thomas*'s will. Assuming that you have equity (WALTON, for the *defendant*, said he should contend that there was no equitable interest in the lessor of the *plaintiff*,) we cannot take notice of it."

LE BLANC, J. "The ground of argument which the *defendant*'s counsel is to take, namely, that there is no equity, shews that we ought not to entertain the question."

JUDGMENT FOR THE DEFENDANT.

The KING *against* the INHABITANTS of ETWALL.—22d *June*.*

Settlement by paying rates. Township.

Where part of a farm lay in the township of W. and part in the parish of B. a poor-rate for the parish of B. for the part in B. was held good; though, previously, the tenant had paid only poor-rate to A. but he had paid tithes and church-rate to B.

The KING *versus* the Inhabitants of ETWALL.

APPEAL by *William Orme*, against the charge of one pound eighteen shillings and one halfpenny, on him, in relief of the poor of the parish of *Etwall*, whereupon the rate was confirmed subject to the opinion of this court upon the following case: viz. "*William Orme*, the appellant, is occupier of a messuage, farm, and lands of considerable extent, as tenant to Mr. *William Fowler*; the farm is situate in two parishes, the dwel-

* Omitted by accident in Vol. II.

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ling-house and about one moiety of the lands are situate in the parish of *Dalbury* in the county of *Derby*, the other moiety of the lands lies in that part of the township of *Dalbury* which is in the parish of *Etwall*; the rate is made upon the appellant as occupier of the last mentioned lands, lying in the parish of *Etwall* as aforesaid. *Dalbury* is a parish, and includes the whole of the township of *Dalbury*, except that part of *Orme's* farm, which is in the parish of *Etwall* as aforesaid. The whole farm always paid poor's rates, highway rates, and constable rates, in the parish of *Dalbury*. The land tax is paid to *Dalbury*, and the overseers of the poor and the constable act for the whole of the township of *Dalbury*, including the said lands in *Etwall*. The church rates for the lands in the occupation of *Orme*, in the parish of *Etwall*, were always paid to *Etwall*. All tithes due for the same lands were always paid to *Etwall*.

GARROW, in support of the order of sessions, contended that *William Orme* was rateable to the parish of *Etwall* for that part of his farm which lay in *Etwall*, although all the rest might be rated in *Dalbury*. He said no case could be made to apply to this.

CLARKE, N. G. "Although the land lies in the parish of *Etwall*, yet it is in the township of *Dalbury*, and by the stat. 13 and 14 *Car. II.* c. 13, townships may be rated separately, and this township keeps its own poor."

Lord ELLENBOROUGH, C. J. "It lies in *Dalbury*, except that part of the farm which is in the parish of *Etwall*."

LAWRENCE, J. "It does not appear that there is any rate for the township of *Dalbury*."

CLARKE. "That is because they have hitherto maintained their poor jointly."

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LE BLANC, J. "You pay church rates and tithes to *Edwall*, and you do not state any rate for the township of *Dalbury*, in which this part of the lands is rated. That would raise a different question upon the construction of the statute of 13 and 14 *Car. II.* c. 12, but here we cannot see but that the land is rateable to *Edwall*."

ORDER of SESSIONS AFFIRMING THE RATE AFFIRMED.

BENTLEY and Another *against* SMITH.—Nov. 22.

The sugar-coopers claimed a right to go upon the West India Docks, *as they would have gone upon the old legal quays, to cooper sugars belonging to private merchants warehoused there; and brought case against the proprietors, for excluding them from exercising their trade. Upon which a special verdict was found. Held, that no judgment could be given,* pro defectu veredicti, *in not stating precisely what legal right the* plaintiffs *had to go on the legal quays, in place of which, for certain purposes the docks were erected; it only stating that the* plaintiffs *were used to cooper sugars for shipment for exportation there, which might be by contract with the owners of such quays: and if to a certain or any extent, such right of going on the quays and the docks might arise ex necessitate, no such necessity was stated in the verdict: it omitting to state what casks were there requiring necessary cooperage to be done upon the wharf. For it is clear the docks are not to be used as the cooper's workshops. Vide Stat.* 39 *G. III. c.* 69; 42 *G. III. c.* 113.

West India Docks. Case. Obstruction of trade. Statutes 39 Geo. III. c. 69; 42 Geo. III. c. 113.

THIS was a special verdict upon an action brought by the *plaintiffs*, who were sugar-coopers in the city of *London*, against the *defendant*, as treasurer of the *West India Dock Company*: for the said company preventing them from exercising their trade and business on the docks and in their wharfs. The *plaintiffs* stated in the first court of their declaration as follows:

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London, to wit, *Benjamin Bentley*, and *Stephen Ward*, pursuant to the statute in that case made and provided, complain of *George Smith*, esquire, treasurer for the

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time being of the *West India* dock company, being, &c. for that, whereas, heretofore, and before, and at the several respective times of the committing the several grievances herein after mentioned; the directions for managing the concerns of the said company called the *West India* dock company, by virtue of the statutes in that case made and provided, had designed, laid out, made, and completed, certain navigable docks, basons, and cuts, and quays, wharfs, and warehouses, adjoining and attached to the same, in and upon a certain tract of land called the isle of dogs, for the reception, discharge, and loading of ships and vessels in the *West India* trade, which said docks, basons, quays, wharfs, and warehouses, before and at the several and respective times aforesaid had become and were fit for the reception of ships and goods, and were, and from thence hitherto have been and still are legal quays, and wharfs, for the shipping and unshipping of goods within the port of *London*, and the said docks, quays, wharfs, and warehouses, were in the possession of the said company by virtue of the said statutes, to wit, at *London* aforesaid, in the parish of *St. Mary la bonne*, in the ward of Cheap. And whereas, before, and at the several and respective times aforesaid, the said *Benjamin* and *Stephen* were and for divers, to wit, ten years before that time had been sugar coopers employed by divers owners, consignees, or purchasers of sugars, to be exported from the port of *London* aforesaid, in taking samples from coopering and preparing for shipment such sugars as aforesaid, for certain reasonable reward to be therefore paid and payable to the said *Benjamin* and *Stephen*, as such sugar coopers, to the comfortable support of the said *Benjamin Stephen*, and their families, to wit, at *London* aforesaid, in the parish and ward aforesaid.— And whereas before and at the several times afore-

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said, divers large quantities, to wit, five thousand hogsheads of sugar belonging to divers persons, the owners, consignees, or purchasers thereof, were lying and being in and upon the said quays, wharfs, and warehouses, attached to the said docks of the said company, for the purpose of being exported thereupon, and the said persons so being owners, consignees, or purchasers of the said sugars, on the same day and year aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, had employed the said *Benjamin* and *Stephen* as such sugar coopers as aforesaid, (and in which said capacity of sugar coopers it was lawful for them the said *Benjamin* and *Stephen* to act) to cooper and prepare for shipping for exportation the same sugars for a certain reasonable reward, to be therefore paid to the said *Benjamin* and *Stephen*, whereof the said company, before and at the said several times aforesaid, had notice, and were requested by the said *Benjamin* and *Stephen* to permit them to enter and go into and upon the said quays, wharfs, and warehouses, to cooper and prepare the said sugars for shipment as aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid; yet the said company well knowing the premises, but contriving and unlawfully intending to injure and prejudice the said *Benjamin* and *Stephen* in this respect, and to prevent and hinder them from coopering and preparing for shipment the said hogsheads of sugar heretofore, to wit, on the said first day of *March*, in the year aforesaid, and on divers other days and times between that day and the sixteenth day of *May*, in the year aforesaid, did wrongfully and injuriously hinder and prevent the said *Benjamin* and *Stephen* from entering, and did refuse to permit and suffer the said *Benjamin* and *Stephen* to enter, and go into and upon the same quays, wharfs, and warehouses, to cooper and prepare for shipment, for exportation, the said hogsheads of sugar, which they had been so em-

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ployed as aforesaid, by the owners, consignees, or purchasers thereof, to cooper and prepare for shipment as aforesaid, by reason whereof the said *Benjamin* and *Stephen* were on the said first day of *March* in the year aforesaid, and on the said other days and times, hindered and prevented from coopering and preparing for shipment the said last mentioned hogsheads of sugar, and have lost and been deprived of divers gains and profits, which would have accrued and arisen to the said *Benjamin* and *Stephen* as such sugar coopers as aforesaid, if they had been permitted to have coopered and prepared for shipment the said last mentioned hogsheads of sugar; and the said *Benjamin* and *Stephen* have been and are in various other respects injured and damnified in the exercising and carrying on the said business of sugar coopers, as aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid.

The *special verdict* found, that on and before the 20th day of *April*, in the year of our Lord, 1804, the directors for managing the concerns of the company in the said declaration mentioned, called the *West India dock company*, by virtue of the statutes in that case made and provided, had designed, laid out, made, and completed certain navigable docks, basons, and cutts, with quays, wharfs, and warehouses adjoining, and attached to the same, in and upon a certain tract of land called the *Isle of Dogs*, for the reception, discharge, and loading of ships and vessels in the *West India trade*, and which said docks, quays, wharfs, and warehouses were inclosed with the walls, gates, and ditches in the manner by the said acts directed, and the same were fit for the reception of ships and goods, and had been certified so to be by three or more of the lords commissioners of his majesty's treasury for the time being, by writing under their hands, which certificate had been published at the times and in the manner by the said acts direct-

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ed, more than ten days before the said 20th day of *April*, 1804, and which quays and wharfs were then and now are legal quays and wharfs, for the landing, relanding, and discharging, lading, and shipping of goods within the port of *London*, according to the said statutes; and the said docks, quays, wharfs, and warehouses were, during all the said times, and now are in the possession of the said company, by virtue of the said statutes, and certain persons were thereof seised in their demesne, as of fee, in trust for the said company. And the jurors aforesaid, upon their oath aforesaid, do further say, that previous and up to the time of making and completing the said docks, basons, cuts, quays, wharfs, and warehouses, and to the same being so inclosed and certified, in manner aforesaid, to be fit for the reception of ships and goods, and up to the time of the commencement of this action, the said *Benjamin* and *Stephen* were sugar coopers, employed by divers owners, consignees, or purchasers of sugar, in the port of *London*, in taking samples from and coopering the same sugars for shipment, for exportation for reasonable reward, to be therefore paid and payable to the said *Benjamin* and *Stephen*, and the said *Benjamin* and *Stephen* so being such sugar coopers as aforesaid, on the 19th day of *April*, 1804, 115 hogsheads of sugar, belonging to certain persons using trade and commerce, under the style and firm of Messrs. *Perrin, Roctras*, and *Co.* were lying and being in and upon the said premises of the said company, so inclosed as aforesaid, for the purpose of being exported therefrom, the said Messrs. *Perrin, Roctras*, and *Co.* intending to export the same therefrom, and which said persons so using trade and commerce as aforesaid, on the said 19th day of *April*, 1804, had retained the said *Benjamin* and *Stephen*, as such sugar coopers as aforesaid, to cooper and thereby prepare for shipment to be exported the said last mentioned 115 hogsheads of

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sugar, for a certain reasonable reward, to be therefore paid to the said *Benjamin* and *Stephen*, whereof the said company had notice, and were requested by the said *Benjamin* and *Stephen*, to permit the said *Benjamin* and *Stephen* to enter upon the said premises of the said company, so inclosed as aforesaid, for the purpose of coopering, and thereby preparing for shipment, the said 115 hogsheads of sugar accordingly, and that the said company did at the said time hinder and prevent, and refuse to permit and suffer the said *Benjamin* and *Stephen* to enter upon the said premises of the said company, to cooper, and thereby prepare for shipment, for exportation as aforesaid, the said 115 hogsheads of sugar, which they had been so retained and directed to cooper for shipment as aforesaid; but the said company did at the same time offer to the said Messrs. *Perrin, Roctras* and *Co.* the owners and proprietors of the said 115 hogsheads of sugar, that they might have them coopered by the said company for a reasonable reward, to be therefore paid by them the said Messrs. *Perrin, Roctras*, and *Co.* to the said company. And the jurors aforesaid, upon their oaths aforesaid, further say, that by reason of such refusal of the said company to the said *Benjamin* and *Stephen*, to permit the said *Benjamin* and *Stephen* to enter upon the said premises of the said company, so inclosed as aforesaid, for the purpose of coopering for shipment for exportation the said 115 hogsheads of sugar as aforesaid, they the said *Benjamin* and *Stephen* were, on the said 19th day of *April*, 1804, hindered and prevented from coopering, and thereby preparing the same for exportation, and have lost and been deprived of divers gains and profits which would have accrued to them if they had been permitted to have coopered and thereby prepared for shipment, for exportation, the said 115 hogsheads of sugar. And the jurors aforesaid, upon their oaths aforesaid, do further say, that at the time of the

commencement of this action the said *George Smith*, Esq. was treasurer of the within mentioned company, and as such treasurer was sued in pursuance of the statute in that case made and provided; and the jurors aforesaid, upon their oaths aforesaid, do further say, that fourteen days notice was given to the said company of the said action, prior to the bringing thereof, as by the said statute in that case made and provided is required; and the jurors aforesaid, upon their oath aforesaid, do further say, that always before and up to and at the time of the making of a certain act of parliament, made and passed in the 39th year of the reign of his present majesty, entituled, an 'Act for rendering more commodious, and for better regulating the port of *London*,' sugar coopers had been used to cooper and thereby prepare sugars for shipment for exportation upon the legal quays and wharfs within the port of *London*, but whether upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid, found, the said company might lawfully hinder the said *Benjamin* and *Stephen* from entering and going, and refuse to permit and suffer the said *Benjamin* and *Stephen* to enter and go into and upon the said inclosed quays and wharfs, to cooper and thereby prepare sugars for shipment, for exportation, and from there coopering sugars for shipment for exportation the jurors aforesaid are entirely ignorant, and pray the advice and judgment of this court of and upon the premises; and if it shall appear to the court of our said lord the king, before the king himself now here, that the said company could not lawfully hinder the said *Benjamin* and *Stephen* from entering and going, and refuse to permit and suffer the said *Benjamin* and *Stephen* to enter and go into and upon the said inclosed quays and wharfs to cooper and thereby prepare sugars for shipment for exportation, and from there coopering sugars for shipment for exportation, then the ju-

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rors aforesaid, upon their oath aforesaid, say that the said company are guilty of the premises in the within declaration mentioned, in manner and form as the said *Benjamin* and *Stephen* have within complained against them: and they assess the damages of the said *Benjamin* and *Stephen* by them sustained, by occasion of the premises, over and besides their costs and charges by them laid out about their suit in this behalf, to 1s. and for those costs and charges to 40s. but if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall appear to the court of our said lord the king, before the king himself now here, that it was lawful for the said company to hinder the said *Benjamin* and *Stephen* from entering and going, and to refuse to permit and suffer the said *Benjamin* and *Stephen* to enter and go into and upon the said inclosed quays and wharfs to cooper and thereby prepare sugars for shipment for exportation, and from there coopering and thereby preparing sugars for shipment for exportation, then the jurors aforesaid, upon their oath aforesaid, say that the said company are not guilty of the premises in the within declaration mentioned, in manner and form as the said *Benjamin* and *Stephen* have within complained against them; but because, &c.

This case was very ably argued in the last term by WOOD, for the *plaintiffs*, and by EAST, for the *defendant*; and again in this term by PARK, for the *plaintiffs*, and the SOLICITOR-GENERAL, for the *defendant*.

The case turned upon the construction of the acts of parliament for creating the *West India Docks*, the material clauses of which will be found abstracted in the notes below.*

* Canal, new docks, &c. to be parts of the port of *London*, and vessels, &c. resorting thereto, to be subject to the

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For the *plaintiffs*. "To exclude the *plaintiffs* from their legal right of exercising their trade of coopers

several present port regulations and duties. § 84. Goods, &c. landed or shipped upon or from the intended quays or wharfs, in the new docks, subject to the same regulations, &c. as if landed or shipped upon or from the present legal quays. § 85. And, for the greater accommodation of the shipping in the *West India* trade, belonging to or using the port of *London*, it is hereby further enacted and declared, that the quays and wharfs, which shall be built by the said directors as aforesaid, within or along the sides or banks of such of the said docks as shall be inclosed and defended on all sides by high walls, and strong and sufficient gates, shall at all times afterwards be deemed and taken, and are hereby declared to be, to all intents and purposes whatsoever, legal quays and wharfs for the landing, relanding, and discharging, lading and shipping, of any goods, wares, and merchandize whatsoever, within the port of *London*; any law or statute, or any usage or custom of the city of *London*, or elsewhere, to the contrary thereof in anywise notwithstanding. § 86. And whereas, by reason or in consequence of certain parts of the works, improvements, and regulations, intended by this act, some of the said present legal quays, and of the other quays or wharfs, commonly called *Public Foreign Sufferance Wharfs* and certain Warehouses, docks, and divers other tenements and hereditaments, now in or adjoining the said port, some of which warehouses are known by the name of *Up-town Warehouses*, and used for the reception of *West India* produce and other goods landed, may perhaps become less valuable, by means of the trade or business of the same respectively being in part diverted, than the same respectively are at present, and divers owners and occupiers of, and other persons interested in, or employed upon the business of such legal quays and sufferance wharfs, warehouses, docks, and other tenements and hereditaments, may thereby sustain loss or damage; and the yearly and other receipts of the governors of *Christ's Hospital* in the city of *London*, for or on account of car-rooms, or figures for using free carts within the said city and the liberties thereof, may also

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the provisions of the act must be express and clear, or they will not have that effect. It cannot be

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thereby happen to be lessened; be it therefore further enacted, that in case such legal quays and sufferance wharfs, warehouses, docks, and other tenements and hereditaments, or any of them, shall by reason of the said intended works, or of any of them, be rendered less valuable by reason or means of the trade thereof being diverted therefrom, than they respectively were before the passing of this act, or any owners or occupiers of the same legal quays and sufferance wharfs, warehouses, docks, and other tenements and hereditaments, or any tackle house porters, ticket porters, or free carmen, of the city of *London*, or other person or persons interested in or employed upon the business thereof respectively, shall by reason of any of the same works, suffer loss or damage, or the yearly or other receipts or income of the governors of *Christ's Hospital* aforesaid, or of their successors, for or on account of car-rooms, shall by reason of any of the same works happen to be lessened or diminished, the said commissioners to be appointed as hereinafter is mentioned for managing the business of the compensations authorised and required to be made by them, do and shall make or cause to be made such just and liberal compensation or satisfaction by purchase, or by employment, or otherwise, to the owners and occupiers of, and the tackle house porters, ticket porters, free carmen, and other persons interested in or employed upon the same legal quays and sufferance wharfs, warehouses, docks, and other tenements and hereditaments so rendered less valuable respectively, and to the Governors of *Christ's Hospitable* aforesaid, or their successors, for the injury, loss, or damage which such owners, occupiers, porters, carmen, and other persons and governors respectively shall have thereby suffered or sustained as shall be agreed on between the said commissioners and such respective owners, occupiers, and other persons interested or employed as aforesaid, or between the said commissioners and governors so far as relates to the said car-rooms. § 121. And in consideration of the great charges

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done by mere intendment. Until the passing of the statute of the 39 *Geo.* III. the *plaintiffs* were used

and expences which the making, building, erecting, and providing of such docks, basons, cuts, quays or wharfs, warehouses, sluices, bridges, roads, and other works, authorised and intended to be made by the said directors as aforesaid, and the supporting, maintaining, and keeping of the same in repair for the future, will amount unto: be it further enacted that from and after notice of the completion of the same last-mentioned docks, and other works shall have been given by public advertisement in the *London Gazette*, and two or more public morning newspapers usually circulated in *London*, as before directed, there shall be payable and paid to the said *West India* dock company, or to their collectors, receivers, or agents, for their use, for every ship or vessel, entering into, and using any of the said intended docks, or any of the basons or cuts which shall belong thereto, by the master or other person having the charge or command of such ship or vessel, or by the owner or owners thereof, (over and above the rates and duties herein before granted to his majesty, his heirs and successors, and to the said mayor and commonalty and citizens), the rate or duty of 6s. 8d. for every ton of the burden of such ship or vessel, except in such cases as are hereafter excepted or otherwise provided for; which rate or duty shall be levied and collected as hereinafter is directed, and shall be accepted and taken for and in satisfaction of the use and conveniency of the said docks, and all charges and expences of the navigating, mooring, unmooring, removing, and management of such ship or vessel, from her arrival at the entrance into the docks at *Blackwall*, until such ship or vessel shall be unloaded and moored in the dock for light ships or vessels, and also of the unloading or unshipping of her cargo within the said docks, and the landing waiter's fees on account thereof, and the cooperage and hoops and nails which such cargo may require in the course of such unlading thereof, together with the use of the light dock for any space of time not exceeding six months from the time of unloading such ship or vessel; and that, from and after such

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to prepare sugars for exportation in the legal quays. By the 84, 85, and 86 sections of the statute, these

notice being given as last aforesaid, there shall also be payable and paid to the said *West India* dock company, or to their collectors, receivers, or agents, for their use, for all goods, wares, and merchandize, imported from the *West Indies*, which shall be landed, unshipped, or discharged from on board of any ship or vessel entering into and using any of the said intended docks, or any of the basons or cuts which shall belong thereto, by the owner or owners, consignee or consignees of such goods, wares, and merchandizes respectively, (over and above the rates and duties herein-before granted), the several rates or duties herein-after particularly rated and described; (that is to say),

For aloes, 4s. 8d.; natural balsam, 4s. 8d.; cassia, 4s. 8d.; cortex winteranus, 4s. 8d.; cocoa, 1s. 6d.; coffee, 1s. 6d.; cotton wool, 2s. 6d.; dyer's woods, 6d.; ginger, 3s. 3d.; gum guaiacum, 4s. 8d. per cwt. Hides, 6d. per doz. Indigo, 2s. 6d. per cwt. Marmalade, 2s. 6d.; castor oil, 2s. 6d. per jar. Pimento, 3s. 2d. per cwt. Rum, 1d. per gallon. Sarsaparilla, 6s.; sugar, 8d.; succads, (in boxes), 5s. per cwt. Tamarinds, or succads, (in jars), 2s. 6d. per jar. Tortoise shell, 5s.; turmeric, 4s. 8d. per cwt. And for wine, including Madeira, 1d. per gallon. For every cask, case, bundle, bale, or other package, containing any article of merchandize not otherwise specified or described in this table, being of the weight of 200, or upwards, 5s. For every such cask, case, bundle, bale, or other package, being under the weight of 200, 2s. 6d. For any article of merchandise, brought loose, (except wood), not otherwise specified or described in this table, and subject to any duty of customs chargeable according to the weight, for every 100, 1s. For any article of merchandize brought loose, not herein-before specified or described, whether subject to any duty of customs or not, and which shall be landed within the dock premises, there shall be collected and paid a rate or duty not exceeding the rate or charge heretofore usually paid in the

quays are put upon the same footing as the legal quays were before the act, and therefore whoever is entitled

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port of *London*, for lighterage, landing, loading, and housing of any such article. Which rates or duties shall be levied and collected as herein-after is expressed, and shall be accepted and taken for and in respect of the use and conveniency of the said docks, and the quays, wharfs, and cranes, and other machines which shall belong thereto, and the land waiter's fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may respectively want after being unshipped, and all rent for warehouse room for such goods, for the space of 12 weeks in the said company's warehouses, and all charges of delivering the same from the said warehouses: and which said rate or duty of 6s. 8d. per ton, and the said several other rates or duties last herein-before granted, shall be and are hereby vested in the said *West India* dock company, and their successors, executors, administrators, and assigns, holding for the time being, shares of the aforesaid capital stock), as their own proper monies, but for the purposes herein-after mentioned; and the said rate or duty of six shillings and six pence per ton, shall be paid at the time of each ship's or other vessel's entry inwards or clearance outwards, at the custom house, in the port of *London*, to the officer or person appointed to collect and receive the same, under such rules, regulations, and restrictions, as are by this act directed and required with regard to the entering inwards and clearing outwards of ships or other vessels, on which other rates and duties are by this act imposed; or for want of such entry, then at any time before such ships or vessels respectively shall sail or proceed from the said docks or basons, so as no ship or other vessel shall be subject or liable to the payment of the said rate or duty of 6s. 8d. per ton more than once for every voyage, both out and at home inclusive: and the rates or duties hereby granted in respect of such of the said goods, wares, and merchandize, to be imported from the *West Indies*, as shall be subject to the payment of any duty

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to any privileges on those quays, will be entitled to the same privileges at the docks, except so far as they are

to the king's majesty, his heirs or successors, shall be payable and paid, when the post entry of such goods, wares, or merchandize shall be made, at the said Custom House, to the officer or person appointed to collect and receive the same; and the rates or duties hereby granted in respect of such of the said goods, wares, and merchandize as shall not be subject to the payment of any duty to the king's majesty, his heirs or successors, shall be payable and paid before such goods, wares, or merchandize respectively shall be taken from the said dock premises; provided always, that when and so often as any ship or other vessel arriving in the said docks shall not be fully laden, the said rate of 6s. 8d. per ton shall only be collected and paid for and in proportion to the actual tonnage of the cargo imported in such vessel, and not upon the register tonnage thereof; and that with respect to such ships or vessels as shall arrive in any of the said docks, from any other part or parts of the world than the *West Indies*, with goods, wares, or merchandize on board, of the growth or produce of the *West Indies*, the said rate or duty of 6s. 8d. per ton shall be payable only, for and in proportion to the quantity of goods, wares, or merchandize, of the growth or produce of the *West Indies*, on board of the same ship respectively; that is to say, 6s. 8d. for every ton of the same goods, wares, or merchandize, and not otherwise.—39 Geo. III. *Loc. & Per.* cap. 69, § 137.

When any of the docks, &c. shall be approved as ready for reception of ships, &c. notice to be published in the Gazette. § 6. Gates and doors of dock premises, to be under the joint locks of the company and the revenue officers. §7. Hours for opening and shutting the gates of the docks, &c. § 8. Hours for the attendance of the revenue officers. § 9. No holidays except Sundays, Christmas days, and Good Fridays, General Fasts, and Thanksgivings. § 10. And be it further enacted, that from and after such publication, and during such term of twenty-one years as aforesaid, upon the arrival of any ship or vessel in the river *Thames*, with a cargo of *West India* pro-

restrained by the express provisions on that head.—The sugar coopers are excluded from exercising two

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duce, the master or commander of such ship or vessel shall, on or before her arrival at *Gravesend*, well and securely lock down and fasten, with strong and sufficient locks and other fastenings, to be provided at the expence of the owner or owners of such ship or vessel, all the hatches leading to or connected with the cargo of such ship or vessel; and from the time of her arrival at *Gravesend* the said master or commander shall remain constantly on board such ship or vessel, and keep her hatches so locked down and fastened until the same ship or vessel be safely moored in one of the said docks, and until such master or commander shall have delivered the keys of such locks or fastenings to such officer or servant of the said company as shall be duly authorized to receive the same; and in case any master or commander of any such ship or vessel shall refuse or neglect to provide such locks and other fastenings, or to lock and fasten down the hatches of such ship or vessel as aforesaid, or to keep the same so locked and fastened down, or shall leave such ship or vessel after her arrival at *Gravesend*, and before she shall be safely moored, and the said keys so delivered as last aforesaid, or shall refuse or neglect to deliver the said keys to such officer or servant as before mentioned, within two hours next after such mooring, every such master, commander, or other person so offending, shall, for every such offence (upon being convicted thereof) forfeit and pay any sum not exceeding 50*l.* nor less than 20*l.* § 13. And be it further enacted, that all goods, wares, and merchandize, imported in ships from the *West Indies*, which shall be landed on the said quays, shall be surveyed and examined by some competent person or persons to be appointed by the said directors for that purpose, and which person or persons shall inquire into and ascertain the causes and extent of any injury or damage which shall have happened to the same, either by sea damage, improper stowage, or otherwise, and shall compute and value such injury or damage, and deliver his or their report in writing thereon to the directors of the said company as soon as may be; and the

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branches of their trade, but not the third, which is the cooperage for exportation. The nature of their

same, or some other person or persons to be appointed in manner last aforesaid, shall collect and take or cause to be collected and taken, samples for sale of all goods, wares, and merchandize which shall be landed on the said quays before the same shall be removed therefrom (the quantity of which samples, in the case of sugar, shall never exceed one pound and a half avoirdupois weight from each cask); and in consideration of the great additional expence and trouble which will be occasioned by such survey and examination, and ascertaining the causes and extent of any injury or damage, and the amount or value thereof, and also by taking such samples of the said goods, wares, and merchandize, and delivering the whole of the said sample to the order of the importers thereof, which he and they is and are hereby required to do, there shall be payable and paid to the said *West India* Dock Company, or their collectors, receivers, or agents, for their use, for all such goods, wares, and merchandize, imported in ships from the *West Indies* as shall be landed, unshipped, or discharged from on board of any ship or vessel within any of the said docks, and shall be so surveyed and examined, and samples taken thereof as aforesaid (over and above the rates and duties by the said recited act granted), the additional rates or duties next herein-after mentioned; (that is to say), for all such goods, wares, and merchandize (except sugar), as by the said recited act are or shall be chargeable with the payment of any rate or duty to the said company, according to the weight thereof, there shall be payable and paid the additional rate or duty of two pence *per* hundred weight, and for sugar the additional rate or duty of one penny *per* hundred weight. And for all such goods, wares, and merchandize, as by the same act are or shall be chargeable with the payment of any rate or duty to the said company, according to the measure thereof, there shall be payable and paid the additional rate or duty of one shilling per cask. Which additional rates or duties shall be paid by the proprietor or proprietors, consignee or consignees of such goods, wares, and merchandize respec-

business is this; when the sugars first arrive, it is necessary to examine the casks and drive nails, to make them tight, in order to be carried on shore; after they are warehoused in the wharfs, it is also necessary to examine and tighten them again, if they are to be car-

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tively, and shall be levied and collected in such manner as in and by the said recited act and this act is directed with respect to the rates and duties made payable to the said company; and the said additional rates and duties are hereby vested in the said *West India* Dock company, and their successors, executors, administrators and assigns, holding for the time being, shares of the capital stock of the said company as their own proper monies, but for the purposes in the said recited act mentioned, concerning the rates and duties thereby granted. § 21.

And whereas by the said recited act of the thirty-ninth year aforesaid, provision is made for making compensation to the owners and occupiers of legal quays, sufferance wharfs, warehouses, and other tenements and hereditaments, and to tackle house porters, ticket porters, and free carmen of the city of London, or other person or persons interested in or employed upon the business thereof respectively: and whereas doubts have arisen how far sugar coopers will be entitled to claim compensation for any injury, loss, or damage they may suffer or sustain in their employment of sugar coopers, by reason of the same works: and whereas further injury, loss, or damage may accrue to the said sugar coopers, by means of certain provisions of this present act; be it therefore further enacted, that the provision made in and by the said recited act, for making compensation to the several descriptions of persons before mentioned, in respect of the injury, loss, or damage they may suffer or sustain by the works therein mentioned, shall, and the same is hereby declared and enacted to extend to sugar coopers, who shall or may prove that they have suffered or sustained any injury, loss, *or damage in their fair and legal employment as sugar coopers, by means of the*

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ried from the wharfs to a private warehouse. And if the sugars are to be re-shipped for exportation, still greater strength is required to be given to the casks for the purpose of sea carriage. The two first branches of the business are exercised upon the casks while in the hands of the original owners chiefly, but the third may be required when the goods are in the hands of a second owner. For the two first, as they are taken away, there is a compensation given for them by the assessment of the commissioners and a jury. In the original act there was even no power given to the company to take samples, and they were obliged to obtain a new act for the purpose. The 39 *Geo.* III. c. 69, s. 137, specifies the compensation to be received by the company, viz. 6s. 8d. per ton for entering. This is to be a compensation also for the cooperage hoops and nails; but that is only what may be necessary immediately after the importation voyage, and the charge falls on the owner of the ship. This charge of 6s. 8d. for every ton, includes the charges and expences of wharfage and landing, and the cooperage and hoops and nails which such cargo may require in the course of such unlading thereof. But this clearly does not apply to the cooperage for exportation, for it is payable by the consignee; and the company does not even pretend that the cooperage for exportation is included in these charges, because they offer to do it, not for the sum there specified, but for a reasonable compensation. The 42 *Geo.* III. c. 113, s. 2, which provides for tak-

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same works, or the provisions of this present act. 42 Geo. III. *Loc. & Per.* c. 113, § 34.

The counsel also referred to the stat. 43 Geo. III. cap. 132, entitled 'An act for permitting certain goods imported into Great Britain, to be secured in warehouse without payment of duty.'

ing samples, plainly does not apply to this exportation business, which seems to have been forgotten. The company has by this clause the whole power of taking samples, and even if sold, and the goods remain in their warehouses, and the vendee wishes to take a second sample for his own use, it seems he cannot do it. In the whole of the statutes it will be seen that the export business has been omitted, and if the parties do not retain the right of exercising it on these quays they are greatly injured, because the compensation which they received was only for the other two branches. It is probable that this construction may defeat some of the provisions of the acts, as to the sole and absolute controul and custody which the company is to have of the goods, while in their warehouses; but that is not a sufficient ground to deprive the *plaintiffs* of their rights, if the words of the act do not expressly provide for that purpose.

For the *defendant* it was at first contended, that whatever the rights of the *plaintiffs* might be, they could not bring this action, but that point was not relied upon in the second argument.

The *plaintiffs* might have been compensated for what they lost by the 39 *Geo.* III. c. 69, s. 121, which gives a compensation to all persons for such loss as they may sustain. And the 42 *Geo.* III. c. 113, s. 34, ascertains clearly, that the coopers are to be indemnified for any loss they may sustain in their employment as sugar coopers; and the compensation is as general and as full as the exclusion. It does not necessarily follow, that because the company is to be paid for taking samples, the owners may not have a right of taking other samples upon paying for both, and therefore the *plaintiffs* may not have lost their business by means of these acts of parliament. Neither had the coopers a *right* to come upon the legal *quays* as far as

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appears by this record; nor have they a right to come into the docks. The very first object proposed in the erection of them was to secure the property from pillage, but this right which is now claimed would expose the docks to such a continual resort as would render them equally liable to pillage, with the ordinary wharfs in *London*. By these acts, ships outward bound for the *West Indies*, may take in their cargoes either in these docks, or at any other part of the river below the canal at *Blackwall*.* Ships outward bound for any other part may be laden at any place whatever, including all *West India* property. Amongst other precautions, as to all ships which are bound to come into these docks, the hatches are to be sealed down at *Gravesend*; the goods are to be landed by the company's servants; they are to examine the damage done to the casks; and they are to take samples. Almost every thing which might be done formerly by the owner or persons employed by him is to be done now by the company. This operates therefore as an implied exclusion of all persons to do work on goods at the docks, but there is no express exclusion of any persons excepting the seamen. By one clause, the company may appoint labourers, and take security; but this will be of no avail if the owners are to send their own coopers It must be admitted that the construction of the claims of compensation to the company do not include the cooperage on exportation. As to the right of using the legal *quays*, the law did not impose upon the owners of the legal *quays* an obligation to permit this cooperage to be done for exportation. Cranes, indeed, are instruments necessary for lading and unlading, and therefore the owners were obliged to keep them: but they are not bound to permit this to be done there which may be done elsewhere;

* 39 *Geo. III.* c. 69, *s.* 91.

and if the coopers had a right or liberty of coming on the legal quays, it must have been by contract or permission, and not by strict legal right vested in them. The verdict only states that it was usual to do the cooperage on the *quays*. If indeed, any damage were done in the carriage to the quays, it might create a necessity of repairing and coopering the casks there. And such a necessity might also arise in case of fire on the quays; in which case the owner might have a right to go with his servants upon the quays for the securing his casks; but all such right of going there must be understood at the utmost as arising out of necessity, and as being subject to some qualification. Supposing even that, by the length of time during which the owners of the legal quays had permitted this resort to the quays, a usage would be presumed, and a right would thence be derived, yet that could not extend to the present case. It is said that a great deal of work is to be done to these casks which cannot be done at home; but that is absurd; for the more there is to be done the greater the necessity of doing it at the proper workshop of the cooper. The hardship is much less in preventing these persons from coming to do their work here, than it would be upon the other merchants, whose property would be exposed to plunder, if they were to be permitted to enter the docks. The remedy of the coopers, in case they have a right to enter the docks, is misconceived, it should be an action against the merchants only.

LAWRENCE, J. "If the merchant has a right to have his casks coopered there, does not the contract with the merchant give him (the cooper) also a right to go, and is not the obstruction an injury to him?"

Lord ELLENBOROUGH, C. J. "Is there not a general right to maintain an action for the prevention from exercising a trade in any place where the party is not by law prevented from exercising it? It is not found

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in the verdict that this work must necessarily be done upon the wharfs. If it is not so, I agree with the *Solicitor General*, that it may be a nuisance. The coopers claim rather too large a right; for the company do not exclude the owners from having that done which may be necessary for the safety of the goods. At the same time the verdict does not state any legal right to go on the old legal quays. I believe the legislature did not think it necessary to mention this case; it was thought that this business might be done by the company or their coopers; but if there is a doubt we ought to lean in favour of the antecedent rights. There is no stipulated price for the use of the docks upon importation or beyond the 12 days upon the exportation. In the act are the words "for delivering the same from the warehouses:" what does that mean?* Why not deliver out of the lighters? There is also this expression, "Such coopering as they may want *after being* unshipped.†" This the *plaintiff* must say applies only to the coopering *upon* being unshipped yet he admits too that it applies to coopering for delivery in town; and the words are large enough to apply to the coopering for exportation.

Cur. adv. vult.

And on this day the judgment of the Court was delivered to the following effect by

Lord ELLENBOROUGH, C. J. After stating the case. "This special verdict is so defectively stated that no judgment can be given thereupon for the *plaintiffs*. The right of coopering, in this case, is claimed on a supposition that the premises of the dock company are from the moment of their being put in the place of the legal quays, subject to all the rights of entry and *user* which are legally claimed there in

* 39 *Geo.* III. c. 69, s. 137. † Ibid.

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exercising the *plaintiffs'* trade upon those quays. But the special verdict is defective in not stating expressly the rights claimed by the *plaintiffs* to be exercised upon the legal quays. It states only, that they used to cooper sugars there for shipment for exportation. But this being only an actual practice of a trade, might, for all that appears to the contrary, have been upon the license of the owners. It is not even stated that the *plaintiffs* had a right to do so, or that the master had a right of sending his servants. No agreement, supposing that to be ever so clearly stated, of the owners of the legal quays can entitle the coopers to come upon these docks to exercise their business as they would have done under such agreement. It should seem also that these docks are not liable to be used by the coopers as a workshop, for work to be done to the casks which might be done elsewhere previous to their exportation. And although out of so many hogsheads some of them might of necessity require to be coopered, and that cooperage might be necessary to be done in that place, yet we cannot take that upon us as a fact, unless it is expressly so stated.

JUDGMENT for the DEFENDANT.

A *venire de novo*, being prayed for by *Wood* for the *plaintiffs*, the COURT refused it, saying, that if a *plaintiff* states a defective case, upon a special verdict, he is never entitled to a new trial, by a *venire de novo*. If he were, it would be a most convenient mode of procuring a new trial for him, but a most vexatious one for the *defendant*.

SHARP *against* GLADSTONE.—12th Nov.

Insurance. Abandonment. Embargo. Salvage. General average.

Upon an embargo or detention where there is an abandonment of both ship and freight to the respective insurers and the owner is paid as for a total loss, and, notwithstanding, the ship

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is released, and earns freight; the wages of the crew, the port, and other charges are quasi, *a general average or salvage on the ship and freight, according to the particular nature of such charges and the persons to whom they belong; and in an action for money had and received by the underwriters on the freight against the assured who has received it, he may deduct the same out of the sum to be recovered.*

CASE for the opinion of the court: Declaration in assumpsit for money had and received by the *defendant* to the use of the *plaintiff*, with the usual money counts; plea, *general issue*. This cause was tried at the sittings at *Guildhall*, after last *Hilary term* before *Lord Ellenborough* and a special jury, who found a verdict for the *plaintiff*, for 100l. with the further sum of 16l. with interest, from the 24th day of *February*, 1802, to the 8th day of *May*, 1803, subject to the opinion of the court on the following case:

The *defendant* as owner of the ship *Jane*, caused a policy to be effected thereon for a voyage from *Liverpool* to *Petersburgh* and back. He also caused another policy to be effected to the amount of 800l. on the freight from *Petersburgh* to *Liverpool*, as interest should appear, to which last policy the *plaintiff* was subscriber for 100l. On the 5th day of *November* 1800, the ship being at *Cronstadt* upon the voyage insured, and being a seeking ship and not a chartered ship, had taken on board a considerable part of her homeward cargo on freight, and the remainder was then loaded in lighters in its passage from *Petersburgh* to *Cronstadt*. The master had signed bills of lading for the said cargo, which was shipped by different merchants, each upon a distinct engagement for freight. The ship would have been ready to sail in six or seven days on her voyage home. On the said 5th day of *November*, 1800, by order of the *Russian* government, the ship was forcibly seized, the master and crew were compelled to quit the ship, and were marched into the

interior of the country, and the said cargo was relanded by the *Russians*, and put into warehouses. The ship, crew, and cargo, remained in possession of the *Russians* until the 22d of *May*, 1801, when the master and crew were liberated, and allowed to take possession of the ship again. The master, upon his liberation, procured the greater part, but not the whole of the original cargo, to be reshipped, for which he signed new bills of lading, and the remaining part of his loading consisted of goods which were no part of the original cargo. The ship continued at *Cronstadt*, for the purpose of procuring and completing her freight on the voyage home, from the 22d of *May* to the 3d of *July*, 1801, when she sailed, and arrived at *Liverpool* in the month of *August*, in the same year. The *defendant* has received the freight earned by the ship on her voyage home, the proceeds of which amounted to above 1900*l*. In the month of *February*, 1801, the *defendant* abandoned the ship to the underwriters thereon, and abandoned the freight to the *plaintiff*, and the other underwriters on freight, as far as insured; and the *defendant* received from the *plaintiff* and the other underwriters on freight, the full amount of their respective subscriptions as for a total loss. The *defendant* claims to have paid the following charges upon the said ship and freight, a proportion of which he claims to deduct from the net proceeds of the freight received by him as aforesaid.

1. Expences of the ship and crew at *Petersburg* and *Elsinore*, including port charges and expence of shipping the cargo, upon which the freight has been paid,	£ 305	14	0
2. Insurance on the same,	9	19	6
3. Wages of and provisions for the master, mate, and seamen, from the time they were liberated in *Russia* till discharged in *England*, being four months,	223	6	11

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4. Charges paid at *Liverpool* on ship and cargo, £ 91 16 5
5. Insurance on ship home, 3000l. at four guineas, less returns. - - - 90 2 0
6. Wages to the master and crew during their detention in *Russia*, being six months, - 270 0 0
7. The *defendant* also claims to be entitled to make the following charge against the freight diminution in the value of the ship and tackle, by wear and tear on the voyage home, she being then employed for the benefit of those interested in the freight, viz. - - - - 300 0 0

The question for the opinion of the court is, Whether the *defendant* is entitled to deduct a proportionable part of any, and which of the said charges, from the amount of the freight received? If the court shall be of opinion, that he is entitled to such a deduction, then it is agreed between the parties, that the amount of the particular charge or charges, in respect of which the court shall think a deduction ought to be made, together with the amount of such deduction, shall be referred to the award of ———. And the amount which the arbitrator shall find, shall be deducted from the verdict obtained, and a verdict be entered accordingly.

This case was argued in *Trinity* term last, by ROUGH, for the *plaintiff*, and SCARLETT, for the *defendant*; and a second time, on this day, by PARK, for the *plaintiff*, and the SOLICITOR-GENERAL for the *defendant*.

Arguments for the plaintiff.—On general principle as well as on the authority of *Thompson* v. *Rowcroft*,* the *defendant* is not entitled to deduct for any of the charges made by him for the sums paid as stated in the case. The underwriters of the ship stand in the same situation as the owners of the ship from the time

* 4 *East*, 52.

of the abandonment, and the *plaintiff* is as the person entitled to the freight. In any case which can be put, the owner of the ship would not be entitled to make the subject of these deductions additional charges, beyond the price of the freight, on the persons who were to pay freight; and the same rule which obtains in that case applies to the present. It may be also considered as if the assured were now bringing an action against the underwriter on the freight. Then he is not entitled to recover of the underwriter more than he is to lose by the peril which has happened. He would only lose the freight; he would not, as owner of the freight, be charged with any of the accidents which happen to the ship, any sum for the wear and tear of the ship, or for the expence of the insurance on the ship. These are all charges which fall on the owner of the ship, not on the owner of the freight. They are therefore not insured against by the underwriter of the freight. The owner of the ship could not have made these charges against the owner of the goods, who was to pay freight if the ship had arrived safe. The abandonment of the ship and freight does not put the owner in a better situation than he would be in before the abandonment, although, as the case at present stands, he is *defendant* instead of *plaintiff*; and perhaps upon a doubtful case may, upon the principle of *potior conditio possidentis*, be entitled to retain what he could not have recovered. Three of the items are such as, if they are allowable in this case, must be chargeable against every freighter or owner of the goods in every ordinary case of an insurance, where the ship returns safe; such as the items for the wages and provisions expended in the voyage home; the insurance on the ship home; and the diminution in the value of the ship by wear and tear in the voyage home. This latter charge is such as the underwriters on the ship would not be liable to pay. This sixth article, of the

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wages during the detention, may be considered as somewhat more questionable. This is only included in the risks insured, if it is included at all, by falling under the article detention of *princes*; and it is now made a question whether it is to fall on the underwriter on the ship, or the underwriter on the freight, or on neither of them; or whether it is to be made the subject of a general average. If it is to form any charge, it must be a general average. In *Robertson* v. *Ewer*,* it was only decided that such expences during an embargo were not recoverable on an insurance of the ship and cargo merely; and though in *Eden* v. *Poole*,† sittings after *Hil.* 1785, such charges were said to fall on the freight, and not on the ship, yet that was not necessary to the decision of the case, for it was sufficient to say that it did not fall within the terms of an insurance upon the ship and tackle only. The reason why it can be made a charge at all is, that the detention of the crew there, is for the general benefit of the whole concern, for the ship, cargo, and freight. So in *Lateward* v. *Curling*,‡ Lord *Mansfield* thought that the expences of the crew might in some particular cases, where the detention was absolutely necessary, be chargeable as a sort of general average; and *Beawes*¶ and *Magens*,‖ put the express case, as a case of general average; and so it is considered in the ordinances of *Louis XIV.* So in *Dacosta* v. *Newnham*.§ The owner of the ship and freight, the defendant, has in this case received the whole amount of his total loss, and he has also received his freight, and therefore ought to pay back the whole amount of the money paid to him. He abandoned all his freight to the *plaintiff*,

* 3 *T. Rep.* 127. † *Park* on Insurance, 61. Edit. 1787.
‡ *Park*, Edit. 1787, 145. *Edit. alter.* 125.
¶ *Beawes*, Lex. Merc. p. 150. ‖ 1 *Mag.* 67.
§ 2 *Term Rep.* 407.

and his ship to the underwriters on the ship. The ship earns freight, and he receives it; but we ought to have received it, and he is to us a wrong doer. 1806.

SHARP versus GLASCOTT.

Lord ELLENBOROUGH, C. J. "Have you considered whether, in abandoning the freight to you, having previously abandoned the ship, he abandoned any thing?"

That point was conceded; the only question at the trial was, whether the *defendant* was entitled to make those deductions. And in *Leatham* v. *Terry*,* and also in *Thompson* v. *Rowcroft*, it was decided that whatever might be the question between the two sets of underwriters, the assured could not retain the freight, he having been paid twice over.

Arguments for the defendant.—When the underwriters have paid as for a total loss, they cannot recover of the assured the money so paid without allowing to him that which he would be allowed as salvage on the freight. The owner, after the payment of the loss, ceases to have any interest in the freight. But he is bound to labour for the benefit of the freighters in the preservation of the cargo. In this he labours for another person, for the underwriter. Salvage is all that the underwriter can claim, and salvage is not the value of the thing saved, but the clear produce of the thing saved, after deducting the expence incurred in saving it. Here was a total loss, and an abandonment, which the underwriters accepted, and paid the money. If the ship had never been restored, no question could have arisen; but the owner of the freight and his captain are bound to labour for the recovery of the freight; and the underwriter after the abandonment must pay them, whether any thing is recovered or not. And there is no doubt that these expences were necessarily incurred in the earning of the freight, which

* 3 Bos. and Pul. 479.

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could not have been earned without it. This ship is a mere blank to the underwriter of the freight, if he is not to be paid for the expence of bringing it home; for the owner of the ship would in that case bring home the ship and earn other freight. These are charges, therefore, which are wholly to be paid by the owner of the freight, who is now the underwriter, or else by the owners of both freight and ship, who are the insurers on the freight and on the ship. Besides those before stated, the following cases were cited: *Dacosta* v. *Newnham*,* *Beale* v. *Thompson*,† *Brough* v. *Whitmore*.‡

The COURT held that this case was not decided either by the case of *Leatham* v. *Terry*, or by that of *Thompson* v. *Rowcroft*, which both proceeded upon the particular circumstances; but that as the question here put was whether the *defendant* was entitled to make any and what deductions, some deductions must be allowed; which were those only that could be considered as either chargeable on the freight alone, or such as were incurred by the *defendant*, in the course of his labouring for the service of both the underwriters.

Lord ELLENBOROUGH, C. J. "As there is no question here upon the effect of the abandonment, but it is taken to be absolute, and to have the effect of substituting the underwriter on the freight, who has paid the loss, in the place of the assured, the underwriter is to have back that salvage which the assured himself receives nett, on the subject of the freight. And the nett salvage is that sum which he receives, subject to charges attaching on the freight. He has likewise abandoned the ship; and yet, afterwards, he continues to exercise a care over those interests which he has aban-

* 2 *Term. Rep.* 407. † 4 *East*, 52. ‡ 4 *Term Rep.* 296.

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doned. But they in whom each specific interest lies, ought to pay him what is properly expended in preserving those interests, and each of the insurers is to have the proceeds of those interests, as a salvage on them respectively, subject to the necessary deductions.—As to the insurance on the ship, that is no charge on the insurer on the freight. As for the *item*, 'to wear of the ship, 900*l*.' we may lay it out of the case, as respects the owner of the freight. And then it seems as if all the rest are properly the subject of deductions in the nature of general average, or more properly, of salvage, which may be adjusted by arbitration. I wish to say nothing as to the effect of the abandonment by the owner, where it is not a chartered ship, and as against the two separate underwriters."

There was accordingly

JUDGMENT FOR THE PLAINTIFF,

Subject to such deductions as should appear to be due, upon reference to a merchant, Mr. *Hankey*, to say, what items, and how much in amount, should be deducted, in nature of general average.

The COURT gave this as a general rule, but it seemed to me that they considered the first item as being struck out. As to the fourth, LAWRENCE, J. said, he *did* not understand what it meant. The insurance on the ship, however, was not chargeable; the wear and tear of the ship also was thought not to be chargeable; but three items, namely the 3d; the 6th, and the 4th, were all chargeable in a proper proportion. But the court gave the general directions as above

Insurance. Abandonment.

ANDERSON, Bart. *against* the ROYAL EXCHANGE ASSURANCE Company.—19th Nov.

Corn was insured free from average, unless general, from Waterford *to* Liverpool. *The vessel was run on shore at* Waterford *on the 28th of* January, *and was wholly under water at high water. Part of the corn was taken out by the insurers and kiln dried, and the assured received the net produce. On the 18th of* February, *21 days after the loss, the assured gave notice of abandonment, which the insurers refused to accept. Held, that the notice of abandonment was too late to entitle the assured to recover as for a total loss.*

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ANDERSON Bart. *versus* ROYAL EXCHANGE ASSURANCE Company.

THIS was an action brought to recover a total loss upon a policy of insurance on a cargo of wheat by the ship *Fanny*, on a voyage from *Waterford* to *Liverpool*, to which action the *defendants* pleaded the *general issue*. The cause came on to be tried at the sittings after *Hilary* term, 1805, before the Right Hon. *Edward* Lord *Ellenborough*, and a special jury, when a verdict was found for the *plaintiffs*, damages 915l. 9s. 8d. and costs, 40s. subject to the opinion of the court on the following case:

The ship in question was loaded at *Waterford* in the month of *January*, 1804, with 2406 barrels of wheat in bulk. The term *barrel* is descriptive of measure and quantity only. The policy in question was effected on the account of *Andrew Comber*, of *Liverpool*, merchant, upon 696 barrels of the said wheat, his property. The same were shipped by *Thomas Nevins*, who acted as the agent of the said *Andrew Comber* at *Waterford*, and were of the value of the sum insured, that is to say, the sum of 1000l. The policy contains the following stipulation. "Free from all average on corn, flour, fish, salt, fruit, seeds, hides, and tobacco, unless general, or otherwise specially agreed." There was no special agreement in the policy, respecting the payment of an average loss on corn. The ship in question sailed from *Waterford* on the voyage insured, on

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the 28th of *January*, 1804, with the wheat insured on board, and in proceeding down the river she struck upon a rock, which occasioned her immediately to fill with water; and, to prevent her from sinking, she was run on shore. The hull of the ship was for four weeks entirely under water at high water, and, until the cargo was taken out, she could not be raised or removed. The whole of the cargo was damaged, and 1635 out of the said 2406 barrels of wheat were taken out of the said ship, and afterwards kiln-dried at *Waterford*. The said *Andrew Comber*'s proportion of the said 1635 barrels so taken out amounted to 473 barrels, which were delivered to the said *Thomas Nevins*, as the agent of the said *Andrew Comber*. Some part of the remainder of the said cargo of wheat was sold to feed hogs, and the residue thereof was thrown into the sea as unfit for use. The whole quantity kiln-dried as before stated, except the said 473 barrels belonging to the said *Andrew Comber*, was, two months after the said accident happened, shipped on board another vessel for and arrived at *Liverpool*, and was received by underwriters on policies including losses by stranding; and the said 473 barrels belonging to the said *Andrew Comber*, might have been forwarded in like manner, if he had given directions for that purpose. The said 473 barrels were sold by the said *Thomas Nevins*, and produced the sum of 249*l.* 1*s.* 9*d*; but the expence of saving and kiln-drying the same reduced the net proceeds thereof to 98*l.* 13*s.* 4*d.* sterling, which sum has been remitted to and received by the *plaintiffs*. After the said ship had remained four weeks in the situation before described, she was weighed up and taken back to *Waterford, then incapable of prosecuting the voyage*, and continued under repairs until the latter end of *April*, by which time she was repaired. On the 18th and 25th *Feb.* 1804, the said *plaintiffs* and also the said *Andrew Comber*, gave notice of abandonment to

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the said *defendants*, but the said *defendants* refused to accept such abandonment.

The QUESTION for the opinion of the Court is, whether the *plaintiffs* are entitled to recover in this action as for a total loss, with benefit of salvage; and if not, then as for a total loss of that part of the goods in question, which were not kiln-dried. If the court shall be of opinion that the *plaintiffs* are entitled to recover as for a total loss of the whole cargo, with benefit of salvage, then the verdict to stand; but if the court shall be of opinion that the *plaintiffs* are entitled to recover only as for a total loss of that part of the goods in question which were not kiln-dried, then a verdict to be entered for the *plaintiffs* for the sum of 356l. 16s. only. And, in case the court shall be of opinion that the *plaintiffs* are not entitled to recover any part of the sum demanded, then a verdict to be entered for the *defendants*.

CLARKE, J. "There was a total loss in this case; for the ship, by reason of the accident, did not arrive at its port of destination, and the object of the voyage was lost. Where that happens, it is a total loss, although part of the goods is saved. *Manning* v. *Newnham*.* *Mason* v. *Skurrey*,† is the leading case upon the construction of the memorandum, which is founded entirely upon the usage, *Cockaine* v. *Fraser*,‡ was a case of a voluntary renunciation of the voyage, and admitting it to be good law it does not apply to this case." He cited also *Goss* v. *Withers*,§ and *M'Andrew* v. *Vaughan*,‖ to shew that the abandonment was in due time.

Lord ELLENBOROUGH, C. J. "This is not a total loss in fact. While there was any part of the adven-

* 2 *Marshall* Insur. 504. *Park* 166. † *Park* 131.

‡ *Park* 114. § 2 *Burr.* 683. ‖ *Park* 115.

ture subsisting, it could only be considered a total loss after the abandonment, and that must be made in a reasonable time. I thought at first that, as there was a total submersion of the goods under water, it was a total loss, but as they were fished up and kiln-dried, there must be an abandonment. It is but three days post from *Liverpool* to *Waterford*. There were, therefore nearly three weeks or at least eighteen days, during which the *plaintiff* neglected to make the abandonment, and treated the goods as his own, and there is a salvage of 95l. 3s. 4d. received. The *plaintiff* could not go for a stranding, because part of the goods were sent forward, and if he had notice of it on the 31st of *January* which he might have had, he was out of time to abandon on the 18th of *February*."

ANDERSON, Bart. and Another *versus* the ROYAL EXCHANGE Assurance Company.

JUDGMENT FOR THE DEFENDANT.

But it being said that the abandonment was in fact within a reasonable time, it was afterwards directed that there should be a new trial to ascertain that fact.

PARISH *against* WOLSTONECRAFT—16th *November*.

Lord's Act. Prisoner. Liberty. Agreement. Practice.

An agreement by a debtor with his creditor not to be entitled to take the benefit of the Lords' act will not be supported by a court of law.

JESSOP moved for the *defendant*, who was a prisoner in the county gaol of *Lancaster*, to be brought up to take the benefit of the Lords' act.

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MANLEY shewed cause, and stated that the *defendant*, at the commencement of the present action, executed a *cognovit* for the debt, being 150l. when the *plaintiff* agreed to take 130l. at four months after the date; and in consideration thereof the *defendant* agreed to pay the money, and not to bring a writ of error nor be entitled to take the benefit of the Lords' act. The

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defendant not paying the money, he was taken in execution last summer.

THE COURT held that the *defendant* could not so bargain with the *plaintiff*, to exclude himself from the benefit of this act, and thus sell his personal liberty.

RULE ABSOLUTE.

LONDON COURT of REQUESTS PLAINTIFF'S Costs. Practice. Statute 39, and 40 Geo. III. c. 104. *Pub. loc.*

BROAD *against* PARKER.—*November 20th.*

An attorney, plaintiff, *suing for his costs, held, not within the jurisdiction of the* London Court *of* Requests, 39 *and* 40 Geo. III. *c.* 104. *He therefore may sue in* B. R. *for a sum less than* 5*l. for costs.*

BROAD *versus* PARKER.

THIS was an action brought by the *plaintiff*, who is an attorney living at *Bath*, for the amount of a bill of costs, for business done for the *defendant*, who resided in *Fetter lane*, *London*, and which was tried at the last assizes at *Bridgewater*, when the *plaintiff* obtained a verdict for the sum of 4l. 8s. 6d.

PELL, for the *defendant*, obtained a rule to shew cause why the *defendant* should not be at liberty to enter a suggestion upon the roll, that the *defendant* resided within the city of *London*, and was subject to and within the jurisdiction of the court of Requests, for the same city, under the stat. 39 and 40 *Geo. III.* c. 104, public local acts, which enacts that 'that no privilege shall be allowed to exempt any person from the jurisdiction of the said court of requests, on account of his being an attorney or solicitor, or any other officer of any of the courts of law or equity at *Westminster*, or of any other court whatsoever; but that all attornies, solicitors, and officers shall be subject to the several processes, orders, judgments, and executions of the said court of Requests, in the same manner as

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any other persons are subject to the same by the said recited acts and this act, or any of them.'

Lens, *Serjeant*, and Burrow, now shewed cause, and contended, that as before the stat. 39 and 40 *Geo. III.* c. 104, attornies were not at all liable to the jurisdiction of the court of *Requests* in *London*, they could not be so now; except under the express provisions of that statute, and that by the clause which subjects them to its jurisdiction, they are only made so in cases in which they are *defendants*; for they are in terms rendered subject to the process, order, judgment, and execution of the court of Requests.* They cited also 2 *Wilson*, 42; and *Hussey* v. *Jordan*,† which was a case arising upon the 23 *Geo. II.* c. 33, a statute which contained terms equally general with the present; and Ashurst, J. said that it could never be in the contemplation of the legislature to subject attornies, when suing for their bills to the court of Conscience for *Westminster*, because it has no process to compel the taxing of costs; and attornies are also bound to deliver their bills a month previous to commencing a suit, in order to have them taxed, which they would in that case not be bound to do, or would in fact evade the effect of it.‡

* Lord Ellenborough, C. J. inquired if the word *judgment* would not apply to a judgment of *nonsuit*, and so meet the case of a *plaintiff*.

† *Dougl.* 38, *in notis. Edit. ult.*

‡ Q. Would not the statutes 3 *Jac. I.* and 2 *Geo. II.* c. 23, s. 23, which require attornies to deliver their bills a month before bringing an action, apply to a suit or process in the court of Conscience? "After the attorney has furnished his bill, and the client does not refer it to a master, to have it taxed, but he drives the attorney to an action, the *defendant* shall not be admitted before a jury to question the reasonableness of the *items*. 1 *Esp.* N. P. cites *Williams* v. *Frith*,

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They added, that the late case of *Sandly* v. *Miller*,* did not point at this distinction.

PELL, *contrà*, relied upon the general words of the statute, which made attornies liable to the court of Requests, and also on the words of the 10th section, referred to by Lord ELLENBOROUGH, C. J.†

Lord ELLENBOROUGH, C. J. "Upon referring to the words of the statute 23 *Geo. II.* c. 33, they are equally general, that any person who can recover a debt in the court of Conscience must sue there. The same reason which governed in that case must prevail in this. We cannot make a different rule. There is an express provision in the present act to render attornies, *defendants*, liable to the inferior court, but the clause omits to mention the case of *plaintiffs*, and *expressio unius est omissio alterius*. The words are, that no privilege shall exempt them from the judgment, order, or process of the said court; but they would have been different if it was intended to apply to them in both

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Dougl. 188. Then is not a court of Conscience put in place of a jury, and at liberty to admit or refuse the evidence of attornies, as to the reasonableness of the *items*? *E contrà*, Q. would not the court of K. B. in term, upon action brought, order proceedings to be stayed upon payment of costs, *i. e.* the debt, to be taxed; or refer the costs, being part of the *debt*, to the master; and could the same advantage be obtained by motion, upon a suit pending in the inferior court? *Semble*, that it could not, unless the inferior court staid their proceedings in the mean time; and therefore the reason of the judgment is good.

* 5 *East's Rep.* 194. 1 *Smith's Rep.* 396.

† Vide *supra*, in notis.

characters. This is not an act which requires any extension."

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BOARD versus PARKER.

GROSE, J. "If we were to compel attornies to sue in the court of Requests, there is no proper officer in the court there to tax the bill; therefore, it would be very inconvenient to the public at large to construe this act of parliament in favour of the *defendant*; and my Lord's observation is very strong, that the words making the attorney liable to the jurisdiction of the inferior court apply mainly to cases of attornies, *defendants*."

LAWRENCE, J. "The words of the stat. 23 *Geo. II.* c. 33, are as strong as these. If that statute was properly construed, we ought to construe this similarly. I wish to decide on that ground, rather than on any other; because there should be an uniformity in the decisions of the court upon similar statutes made in *pari materia*. The inconvenience, on the other hand, would be very great, if, because a client removes into the city of *London*, the attorney is obliged to follow him there. If indeed the words of the act would have borne no other construction, we must have given them that effect."

LE BLANC, J. of the same opinion; for though, previous to suing, the *plaintiff* might apply to have the bill taxed, yet the superior courts might order it to be taxed at any time.

RULE DISCHARGED.*

* Q. If a bill of costs has been taxed before action brought, will that differ the case? *Semble*. The ground of the decision stated in *Dougl.* 381, fails; but the other grounds of inconvenience which were relied on by Lord ELLENBOROUGH, C. J. and mentioned by LAWRENCE, J. both upon the first motion and upon shewing cause, still remain. So also does the argument from the words of the 39 and 40 *Geo. III.* c. 104, s. 10. I did not understand that the costs here were taxed.]

1805. Mc MICHAEL *against* JOHNSON.—22d *November.*

Pleading. Outlawry. Declaration.

In declaring against one defendant *upon a contract jointly with another* defendant *who is outlawed, it is not necessary to aver the outlawry with a* prout patet per recordum, *if it appear to be in the same suit.*

Q. *Whether it is necessary if the outlawry be by another and extrinsic record?*

M'MICHAEL versus JOHNSON.

THE *plaintiff* declared in *assumpsit* on a bill of exchange as follows:—*Middlesex*, to wit, *Robert Johnson*, late of *Byker*, in the county of *Northumberland*, Esq. *J. L.* late of, &c.; *T. L.* late of, &c.; and *T. T.* late of, &c. engineer; were attached to answer the *plaintiff* in a plea of trespass on the case. And whereupon the said *plaintiff* by *Henry Maddock* his attorney, complains, *for that whereas* the said *Robert J., T. L. T. T.*, and one *Henry Grey Macnab*, late of, &c. doctor of physic, which said *Henry Grey Macnab*, by due course of law has been outlawed, at the suit of the said *Daniel* in this plea and suit, and still remains so outlawed, &c.

To this declaration, the *defendants* demurred specially, and shewed for cause, "that it is not alleged, stated, or shewn in and by the said declaration, that there is any record of the said outlawry therein mentioned, nor hath the said *plaintiff* in or by his said declaration offered to verify or prove his said allegation by the same record, nor hath the said *plaintiff* alleged the time when the said *H. G. Macnab* was so outlawed as in the said declaration is mentioned, or that he was so outlawed in the court of our said lord the king himself, &c.

TAUNTON, in support of the demurrer, cited *Guy* v. *Goddard*,* where a general averment, *quod talis est*

* *Siderfin*, 123.

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ditagatus, was held good, after verdict, and inferred that it would be bad upon a special demurrer, as here. The judgment of outlawry, he said, was a material fact upon which issue might be taken, and therefore it ought to have been averred upon record, in order to enable the *defendants* to take the proper issue, by pleading *nul tiel record* of the judgment of outlawry. In *Symonds* v. *Parminter*,* it should seem, that the outlawry was set out at full, as it ought to have been here, otherwise the incongruity of the time of the outlawry, being of a term subsequent to the declaration, could not have appeared upon the record. He cited also *Whiteman* v. *Mullins*,† to shew the necessity of averring a material fact, though it be but collateral, by record, where it must, if it exists at all, exist by record.

Lord Ellenborough, C. J. "The only point in *Symonds* v. *Parminter* is the inconsistency of the record: it is wholly silent upon the necessity of averring the outlawry to be of record. It is every day's practice to state it as it is in this case; and you have no authority to shew that a *prout patet per recordum* is necessary. If it had been a fact appearing only upon an extrinsic record in another suit, and the practice had not run uniformly in favour of the *plaintiff*, there might be more in the argument to shew that it is necessary. Here it is averred that he was outlawed 'in the plea aforesaid;' in the very record now before the court. There is therefore no uncertainty. And it is not like an averment by another record, which might create some uncertainty."

Lawrence, J. "I did not conceive that this objection was intended to have been relied upon. In

* 2 *Wils.* 78, 97. † 2 *Strange*, 1210.

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my own experience I never knew an outlawry to have been alleged with a *prout patet*. I have asked my learned brothers, who have all had great experience in pleading, and they have heard of no such thing. For the purpose of this case, I examined the older entries, and I find this form is pursued in *Brownlow Redivivus*; in *Lilly*, 20; in 1 *Brown*, 17; and also in *Lutwyche*, 39.

JUDGMENT FOR THE PLAINTIFF.

HITCHEN *against* BARTSCH.—22d Nov.

Bankrupt. Assignment by Commissioners. Personal property. Subsequent earnings of Bankrupt. Stat. 13 Eliz. c. 7, s. 11.

To an action on a promissory note given to an uncertificated bankrupt after the commission issued, the defendant *pleaded the bankruptcy of the* plaintiff, *and the commissioners' assignment: and that the assignees demanded payment of him; the* plaintiff *replied, that there had been no new assignment to the assignees, after the making of the note, and that the* defendant *treated with the* plaintiff *as one capable of contracting personally. Held, on demurrer, that the demand by the assignees vested the right in them, that a new assignment of personal property was not necessary, and that the mode of contracting was immaterial.*

Hitchen *versus* Bartsch.

THE *plaintiff* declared against the *defendant* upon a promissory note dated the 15th of *August*, 1801, payable to the *plaintiff* at 8 months after date for 50l. sterling, with interest, and also upon a promissory note of the same date, at 6 months, for 30l. and also upon the common counts for goods sold, money lent, &c.

The *defendant* pleaded, first the general issue; and secondly, that before the making the said several promises and undertakings in the said declaration mentioned, and before the several causes of action therein specified, had accrued to the said *William Hitchen* (to wit,)

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on the 5th day of *June* in the year of our Lord 1801, to wit, at *London* aforesaid, in the parish and ward aforesaid, the said *William Hitchen* then and there being a corn-dealer, dealer and chapman, and seeking his trade of living by buying and selling, and being also indebted to *William Sprout* in the sum of 100l. and upwards, became and was a bankrupt, within the intent and meaning of the several statutes made and now in force concerning bankrupts, some or one of them; and that, thereupon afterwards, to wit, on the 5th day of *June*, in the year of our Lord 1801, aforesaid, at *London* aforesaid, in ward aforesaid, a certain commission under the great seal of *Great Britain*, bearing date at *Westminster* in the county of *Middlesex*, the day and year last aforesaid, afterwards grounded upon the same several statutes, some or one of them, was duly awarded and issued forth upon the petition of the said *William Sprout*, directed to certain commissioners, that is to say, to *William Wicksted*, and *John Hull*, Esquires, *Charles Bate*, *Thomas Nixon*, and *William Lowe*, gentlemen, thereby giving full power and authority to them the said commissioners, four or three of them to execute the same, as in and by the said commission, relation being thereunto had, will more fully appear; by virtue of which said commission, and by force of the said several statutes concerning bankrupts, the said *William Hitchen* was afterwards and before the making of the said several promises and undertakings of the said *Ernest George* in the declaration mentioned, to wit, on the 8th day of *June* 1801, aforesaid, to wit, at *London*, &c. duly adjudged to be a bankrupt, and the said *Ernest George* further says, that afterwards and before the making of the promises and undertaking of the said *Ernest George* in the said declaration mentioned, to wit, on the 8th day of *July* in the year of our Lord 1801, aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, by a certain

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indenture then and there made and signed by three of the said commissioners, sealed with their respective seals, bearing date the day and year last aforesaid, and now in the custody or power of the said *William Sprout* and one *Samuel Davies*, but which is not nor hath at any time been in the custody or power of the said *Ernest George*, all and singular the goods, chattels, wares, and merchandize, effects and debts, sum and sums of money, and all other personal estate whatsoever, whereof the said *William Hitchen* was possessed, interested in, or entitled unto at the time he became a bankrupt, or at any time since; and all the estate, right, title, interest, equity of redemption, property, claim, and demand whatsoever of him the said *William Hitchen*, of, in, or to the premises or any part thereof, were in due manner bargained, sold, assigned, and set over to the said *William Sprout* and *Samuel Davies*, in trust for the benefit of the creditors of the said *William Hitchen*, as in the said indenture is expressed, and the said *Ernest George* in fact says, that the said several promises and undertakings, and also the said several causes of action in the said declaration mentioned, were first made and first accrued to the said *William Hitchen*, after the time when he the said *William Hitchen* was so as aforesaid adjudged to be a bankrupt, to wit, on the said 15th day of *August*, in the year of our Lord 1801, aforesaid, to wit, at *London* in the parish and ward aforesaid; and that he the said *William Hitchen* had not on that day and year last aforesaid, nor has he at any time since obtained a certificate from the said commissioners or four or three of them in the said commission named; of the said *William Hitchen* having in all things conformed to the direction of the several statutes made and then in force concerning bankrupts: and the said *Ernest George* further in fact says, that after the making of the said several promises and undertakings in the said declaration mentioned,

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to wit, on the 1st day of *November* in the year of our Lord 1804, to wit, at *London* aforesaid, in the parish and ward aforesaid, the said *William Sprout* and *Samuel Davies* as assignees, as aforesaid, required the said *Ernest George* to pay to them the said several sums of money in the said declaration mentioned, and therein supposed to be due and owing from the said *Ernest George* to the said *William Hitchen*, by reason of which said premises and by virtue of the said indenture, and by force of the said statutes, the said *William Sprout* and *Samuel Davies* as such assignees as aforesaid, afterwards, to wit, on the day and year last aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, became and were entitled to the several sums of money and causes of action in the said declaration mentioned, if any such there are; and this the said *Ernest George* is ready to verify; wherefore, &c.

The *plaintiff*, in his replication, entered a *noli prosequi* on the fourth, fifth, seventh, and eighth counts, and after joining issue upon the plea of general issue to the rest, replied as to the special plea, that the said several promissory notes, in the said first, and second counts of the said declaration mentioned, were, and each of them was made and delivered by the said *Ernest George* to the said *William Hitchen*, after the said *William Hitchen* became a bankrupt, and after the issuing of the said commission, and after the making of the said assignment, in the said last plea of the said *Ernest George* mentioned, and that the said sum of money in the said sixth count of the said declaration mentioned, was lent and advanced by the said *William Hitchen* to the said *Ernest George*, after the said *William Hitchen* became a bankrupt, and after the issuing of the said commission, and after the making of the said assignment in the said last plea mentioned, and that the said several promises and un-

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dertakings in the said first, second, and sixth counts of the said declaration mentioned, were and each of them was made, and that the said several causes of action in the said first, second, and sixth counts specified, and each of them accrued to the said *William Hitchen*, after he became a bankrupt, and after the issuing the said commission, and after the making the said assignment in the said last plea mentioned; and that the said *Ernest George*, at the time when the said several and respective promissory notes, in the said first and second counts of the said declaration mentioned, were made and delivered by the said *Ernest George* to the said *William Hitchen*, and also, at the time when the said sum of money in the said sixth count of the said declaration mentioned, was lent and advanced by the said *William Hitchen* to the said *Ernest George*, and at the time of the making the said several promises and undertakings in the said first, second, and sixth counts of the said declaration mentioned, treated with the said *William Hitchen*, as a person capable of receiving credit in those behalfs, to wit, at *London* aforesaid, in the parish and ward aforesaid; and the said *William Hitchen* further says, that the said *William Wicksted*, *John Hull*, *Charles Bate*, *Thomas Nixon*, and *William Lowe*, the said commissioners in the said last plea mentioned, have not, nor have any four or three of them, at any time since the making or delivering of the said several and respective promissory notes, in the said first, and second counts of the said declaration mentioned, or either of them, or at any time since the said sum of money in the said sixth count of the said declaration mentioned, was lent and advanced by the said *William Hitchen* to the said *Ernest George*, or at any time since the said several causes of action in the said first, second, and sixth counts mentioned, or any of them, accrued, bargained, sold, assigned, or set over to the said *William Sprout* and *Samuel Davies*, or either of them,

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or to any person or persons whatsoever in trust for the benefit of the creditors of the said *William Hitchen*, or otherwise, the said several promissory notes, in the said first and second counts of the said declaration mentioned, or either of them, or the said sum of money, in the said *sixth* count of the said declaration mentioned, to be lent and advanced by the said *William Hitchen* to the said *Ernest George*, or any of the estate and effects of the said *Ernest George* which accrued or came to the said *William Hitchen*, since the making the said assignment in the said last plea of the said *Ernest George* mentioned; and this the said *William Hitchen* is ready to verify: wherefore he prays judgment, and his damages, &c.

To this replication the *defendant* demurred; the *plaintiff* joined in demurrer.

RICHARDSON, for the *defendant*, made two questions; first, whether a new assignment is necessary of personal property, acquired subsequently to the assignment, in order to vest it in the assignees; and secondly, whether the demand made by the assignees on the *defendant*, would bar the *plaintiff*'s action? Probably this question has remained hitherto undecided, only because, whenever it has occurred in practice a new assignment was actually made in order to remove all doubts. By the stat. 13 *Eliz.* c. 7, s. 11, "if any person declared a bankrupt, shall, at any time purchase any lands, tenements, hereditaments, free or copy, offices, fees, goods, or chattels, or any land, tenements, hereditaments, free or copy, offices, fees, goods, or chattels shall descend, revert, or by any means come to such person before such his debts due to his creditors shall be fully satisfied and paid, or otherwise agreed for, then the said lands, &c. goods and chattels, shall, by virtue of the act, by the said commissioners to be appointed as aforesaid, be bargained, sold, extended, delivered and used for, and towards the payment of the said creditors in such like manner and form as other the lands, tenements,

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hereditaments, free or copy, offices, fees, goods, and chattels of the said bankrupts, which they had when they were first declared to be bankrupts, should or might have been bargained, sold, disposed or used, by virtue of this act. Under this statute it was usual to assign the property in parcels to each particular creditor. But the *5 Geo. II.* c. 30, s. 26, directs that particular assignees shall be chosen for the benefit of all the creditors, and then a general assignment became sufficient to pass all the future personal effects. On this point indeed *Eyre, C. J.* in *Fowler* v. *Down,** suggests a doubt, and thinks that there would be good reason, for requiring a new assignment of personalty as well as reality; but in *Ex parte Proudfoot,*† it was held clearly, that a second assignment was unnecessary as to the newly acquired personalty; although it was requisite as to the realty." He then contended that the length of the practice upon the subject, was sufficient to establish the construction of the statutes, that no such new assignment was necessary. And upon the second question, he cited *Evans* v. *Mann,*‡ *Tudway* v. *Bourne,*‖ *La Roche* v. *Wakeman, Evans* v. *Browne,*¶ *Silk* v. *Osborn,*** *Webb* v. *Fox,*†† *Ashley* v. *Kele,*‡‡ *Hopkins* v. *Ewer,* and *Chippendale* v. *Thomlins,*§§ from the general result of which, he contended, that although the bankrupt might bring an action for newly acquired property, under a contract with the *defendant,* and until the assignees interposed and claimed their interest in it, the action was well maintained, yet the claim actually made by the assignees immediately

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* 1 *Bos. & Pull.* 44. † 1 *Atk.* 252.

‡ *Cowp.* 569. ‖ 2 *Burr.* 716. § *Peake's Ca. Ni. Pri.* 140. ¶ 1 *Esp. Ca.* 170. ** *Ibid.*

†† 7 *Term Rep.* 391. ‡‡ 2 *Strange,* 1207.

§§ *Buller, Ni. Pri.* 153. ‖‖ 1 *Cooke's Bank. Laws, Ed.* III. 513, *c.* 8, *s.* 21.

devested the right out of the bankrupt, and therefore that the *plea*, which stated a demand on the *plaintiff* by the assignees, was a sufficient bar to the action.

LITTLEDALE, *contrà*, contended, that by the express words of the statute 13 *Eliz.* c. 7, s. 11, the assignees could not recover the debt of the *defendant*, without a new assignment. And by the statute 1 *Jac. I.* c. 15, s. 13, the commissioners are empowered to assign debts due, or to be due, to or for the benefit of the bankrupt; whence it appears, that upon the former statute it must have been then doubted, whether it applied to the recovery of debts. By the 5th of *Anne*, c. 22, the commissioners were directed to assign only to *special* assignees, which act was continued, and made perpetual by the stat. 5 *Geo. II.* c. 30. But these statutes only appoint the mode of the assignment. Supposing that the words of the statutes apply to future debts, and that they pass by the assignment, yet it does not appear from this plea, that the assignment contained words to pass the future debts. The distinction in practice between real and personal estate, may have arisen from some supposed analogy to the case of a will which passes after accrued personal, but not real property; this, however, arises from the words of the statute of wills, which apply only to such estate as the testator hath at the time of the making. And admitting the inference from the cases above cited, he suggested that although the plea stated a demand to be made on the *defendant* by the assignees, yet it did not state the right in which they demanded it. All the cases being referred to in the argument for the *defendant*, he cited no others, but relied on the dictum of *Eyre*, C. J. in *Fowler* v. *Down*.

Lord ELLENBOROUGH, C. J. "The inconvenience would be very great if assignments were to be made *toties quoties*, as the property accrues, and that

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may have induced the practice which has prevailed, and the construction upon the statute which has been uniform except in the single instance of a legatee, where a new assignment was made *ex abundanti cautela*, *Tudway* v. *Bourn*.* The plea imports that the demand was made by the assignees in their right, as assignees. The *defendant* is bound to pay to the *assignees*; he may not be able to pay immediately, but he is still liable, and may hereafter be compelled to pay to them. It is said in two of the cases in which a bankrupt has been allowed to recover, that until the assignees interfere, he has the right to the money, but that the assignees may claim it, and if they do claim it, and take any steps to dispute his title, they become entitled in his place; if they do not, then the bankrupt, being the ostensible owner, may convey a title. Now have they not in this case claimed, and has not something been done to dispute his title? Lord *Kenyon* does not limit his proposition to the sale of a ship, which was the point in the case before him, or to making the claim at any particular time. As to the party having treated with the bankrupt as one capable of making a contract, a man is not bound to make such a contract good, where the party with whom he treats has no title. If indeed this were a case to be decided now for the first time, there would have been a good deal of solid argument, that an after-assignment of personal property newly accrued is necessary. But there has been an uniform series of construction from the time of passing this statute. There may even have been earlier decisions than that of *ex parte Proudfoot*, that the assignment passes not only the immediate property, but the future effects also. The words of the statute apply certainly to

* 2 *Burr.* 718.

personal as well as real property, and do somewhat militate against the practice which has been set up under the provisions of the stat. 13 *Eliz.* c. 7. s. 11. But it would be too much to say now, from the literal construction of an act of parliament, that the uniform decisions upon it are erroneous. And this uniform construction is confirmed by the stat. 1 *Jac. I.* c. 15, s. 13, by which the assignment of debts due and to become due is to be made by one deed of assignment. Whether this has been applied to all the property, as well as to the debts to become due, I know not; but it would be dangerous at such a distant period to recur to the literal construction of the statute. There is no case, except *Tudway* v. *Bourn*, in which there has been a special assignment, and that was in the case of a legatee. In the case of *Jacobson* v. *Williams*, Lord *Harcourt*, as to the objection, that the assignment was made before any right to the legacy vested in the wife, said, it was not so much to be regarded, because the commissioners might supply it by making a new assignment. On the grounds stated in *Fowler* v. *Down*, which were mentioned by the very learned person who made the observations in that case upon the stat. 13 *Eliz.* c. 7, whether supposing a bankrupt uncertificated incapable of acquiring property beneficially to himself, he can recover for the use of the assignees, that has been determined in a multiplicity of cases, as in *Thompson* v. *Chippendale*. Upon the first of these cases, it might have been more convenient to have remedied the defect by an act of parliament, than to have come to that decision. It was said there, that if the assignees did not interfere, the bankrupt might recover in his own right. Lord *Mansfield* said, that otherwise he would be starving; and perhaps the hardship of the case warped a little the decision. After 30 years acquiescence, we will not disturb it; but here the assignees have claimed the

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money as due to them; which differs the case from all which have been decided upon that principle."

GROSE, J. "I am of the same opinion on both points. After the decision of so able a judge as Lord *Hardwicke*, in the case of *Proudfoot*, it would be removing landmarks to doubt whether a second assignment would be necessary."

LAWRENCE, J. "I am of the same opinion upon both points. It would be too late now to enter into the construction of the statute 13 *Eliz.* c. 7, s. 11. The bankrupt is only entitled to recover in case the assignees have not interfered, and no case of interference can be more clearly stated than it is here. If they had not insisted upon the payment, but had relinquished their demand after making it, the *plaintiff* might have replied to it, and shewn that the interference was not such as to bar the right of the *plaintiff*.

LE BLANC, J. "On the second point, in all cases where the bankrupt has been permitted to recover, and where there have been rules for the assignees to give security for costs, the courts have always admitted the authority of the assignees to claim the money. These are very strong authorities. If these actions are brought by the assignees in the name of the bankrupt, the assignees are made to give security for the costs. But the courts have said that where the assignees do not claim, they will not turn the *plaintiff* round by setting up such a claim, where it does not exist. That is the same as saying, that if the assignees do claim it, we will permit them to take it."

JUDGMENT for the DEFENDANT.

ELIZ. TRENT, Widow, and Others, *against* JOHN HANNING and Others.—18th Dec. 1805. 1805.

A testator having an estate settled on himself for life, remainder in trust to secure 500l. a year to his wife in lieu of dower; remainder to trustees for 200 years, for the better securing of the annuity; remainder to himself in fee; gives 200l. per annum to his wife in addition to her jointure, his just debts being previously paid; and appoints three persons "as trustees of inheritance for the execution hereof;" held, dissentiente, LAWRENCE, J. *"that the trustees take an estate in fee in remainder, subject to the term of 200 years."*

Devise. Trustee of inheritance. Estate by implication.

TRENT and Others *versus* HANNING and Others.

THE following case has been sent by the right honourable the Lord Chancellor for the opinion of the judges of the court of *King's Bench*.

John Trent, being seised in fee of certain plantations, and premises in the island of *Barbadoes*, in contemplation of a marriage between him and *Eliza Phipps*, which soon afterwards took effect, by indentures of lease and release, bearing date the 29th and 30th days of *October*, 1792, bargained, sold, aliened, released, and confirmed the said plantations and premises to *Samuel Estwick*, to hold to the said *Samuel Estwick*, his heirs and assigns, to the use of the said *John Trent*, till the marriage, remainder to the use of the said *John Trent* and his assigns for life without impeachment of waste, with remainder in trust to secure an annuity of 500l. a year for her life to the said *Eliza Phipps*, in lieu of dower, with remainder to trustees for 200 years, for better securing the payment of the said annuity; with remainder to the said *John Trent* in fee. The said *John Trent* on the 5th day of *August*, in the year 1796, made his last will and testament in writing (duly executed and attested, so as to pass real estates,) in the words following (that is to say): "*I John Trent* do hereby give unto my wife 200l. per annum during her natural life, in addition to her jointure, my just debts being

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previously paid; and I do give unto my two younger children 6000l. each, to be paid when they severally come to the age of 21; and I do appoint *John Hanning*, *William Hanning*, and *Constantine Phipps*, as trustees of inheritance for the execution hereof." The said *John Trent* afterwards died without revoking or altering his said will, leaving his widow, the two younger children mentioned in his will, and a child born afterwards, to whom he gave 6000l. by a codicil, him surviving. The said *Constantine Phipps* survived the said *John Trent*, and is since dead.

The questions for the opinion of the court are, whether the said *John Hanning*, *William Hanning*, and *Constantine Phipps*, took any and what estate or interest in the real estates of the said *John Trent*; or, whether they had by virtue of such will a power to make any conveyance or appointment of any and what estate or interest of or in such real estates; and if they had, whether such power survives to the said *John Hanning* and *William Hanning*?

This case was argued in *Easter* term, 1805.

PEAKE, for the *plaintiff*. "The intention of the testator, was to make provision for the payment of his debts, and for his widow, and his youngest children, the eldest son being provided for; and he intended to do this out of his estate in fee, for he executes his will so as to pass lands; he charges 200l. per annum, for his widow in lieu of her jointure, charged on lands, whereby he contemplates the same security, and he appoints three persons *trustees of inheritance*, for the execution of the pusposes of that will. This word inheritance can only apply to land, and not to personalty, and must further import a descendible interest in land, and he must thereby intend to devise the inheritance to the trustees and their heirs, till the trusts of the will are fully completed. And if the purposes of the will require a fee to be vested in them, they will take

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a fee.* And the appointment of them, as trustees in this will, imposes a duty upon them, to raise certain money, for which purpose the law will raise an adequate estate. *Taylor* v. *Webb.*† There the testator made G. B. sole *heir* and *executor*, and the court *held*, that by making G. B. *heir*, the testator meant he should have his lands; and having made him executor, if he should not have his lands, the word *heir* would be nugatory. *Marret* v. *Sly*, S. P.‡ This establishes, that where the devisee is to fill a particular character, as *hæres factus*, which implies a devise of the inheritance of the lands, there shall be such devise by implication; and trustee of inheritance, is equivalent to the making one his *heir*. And where the trust of the will cannot be performed without the devisee in trust taking an estate in fee, the law will imply it; *Shaw* v. *Weigh*,¶ *Oates d. Markham* v. *Cooke*.§ Besides which, there are other classes of cases of estates by implication as a devise to B. after the death of A. in which case B. takes an estate for life. *Willis* v. *Lucas*,‖ *Roe d. Beadsle* v. *Summerset*,** which all proceed upon collecting the intent of the testator, without express words: for in none of these cases was there any formal set of words. But even if the trustees do not take an estate, they have a power given to raise the legacies from the lands; for the purposes for which they are appointed require it; and as they are devisees of inheritance they take the land, for a devise of the inheritance passes the land; *Wildlake* v. *Harding*;†† — and even as they are to raise the annuity for the wife and the money for the younger children, that alone gives them a power over the land, as a fund to supply those purposes."

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* 4 *Vesey*, 491. † *Style*, 301, 307, 319. ‡ *Sid.* 75.
¶ 2 *Strange*, 798. § 3 *Burr.* 1684. ‖ 1 *P. Will.* 472.
** 5 *Burr.* 2608. †† *Hob.* 21. *S. C. Moore*, 873.

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TRENT and Others *versus* HANNINO and Others.

LORD ELLENBOROUGH, C. J. "You must shew first that they have that fund given to them."

PEAKE. "By appointing them trustees of inheritance, the testator must be supposed to have given them power over the land, without which the will is nugatory, and under a general power to charge, a man may direct a sale, *Long* v. *Long*.* Though it is a general rule that all must join in the execution of a power, yet if the power is connected with a certain character as executor, there the survivor may execute it; *Lock* v. *Logger*;† or if it be given to a man and his assigns; *How* v. *Whitfield*;‡ and as these persons are nominated trustees of inheritance, the power must descend to the *heir* of the survivor. But where it has been held that all must join, the parties were so expressly required by the words of the will; and where no person is expressly named, the law will give the power to him who is to have the money, as to an executor for payment of debts; *Dyer*, 371, b. There one appointed lands for payment of debts, without naming the trustee, and there being two executors, one of them after the decease of the other, charged the lands, and it was held good;§ and at least equity will supply a trustee."

MOORE, A. *contrà*. "The intention of the testator cannot be collected from this will. He appoints the trustees as trustees of inheritance for the purpose hereof; which is not so strong as if he had appointed them trustees of inheritance. He might have considered the office of a trustee of inheritance with some confused notion from the civil law, according to

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* 5 *Vez. jun.* 445. † 1 *Anderson*, 145. ‡ 1 *Vent.* 338, 339. § He cited also *Garford* v. *Garford*, 1 *Ch. Ca.* 35. *Guillam and Another* v. *Rowel and Another*, *Hard.* 204; and *Pitts* v. *Pelham*, 1 *Lev.* 304.

which they may have no relation to lands. The case of *Oates* v. *Cooke* is very distinguishable, for there the devisee was to build a tomb for the testator, and he and his heir always to see it kept in order; and there was also a condition that the devisee should pay debts. In *Taylor* v. *Webb*, G. B. was made heir and executor, and if he had not taken the lands, the appointment of heir would have been nugatory. The devisee was also to pay an annuity, and the testator directed him where to find the title-deeds. *Marrit* v. *Sly* was only deemed obscure on account of the false English. It is a very forced construction to infer that the testator meant to give the inheritance, merely because he refers to the jointure which is charged upon a term; for the debts are charged on the same fund as the jointure, and there is no mention of lands in the whole will. In *Gardner* v. *Sheldon*,* it is explained, that an estate by implication cannot be taken where the inference is only possible, but where it is absolutely necessary and unavoidable. Here trustees are appointed for a particular duty, and it does not appear, that they could not discharge it without having an estate in fee. There is no intention of giving them a power to sell the lands, or to mortgage them or raise money upon them. Where there are trusts, and no person is appointed to execute them, a court of equity will do it."

Lord ELLENBOROUGH, C. J. "If the trustees take the inheritance, can they not carve out a term such as will support the jointure? Now a power as trustees of inheritance would enable them to do so."

MOORE then cited *Yates* v. *Compton*,† and *Co. Litt.* 113, *a*, and note 2, upon the same passage by *Hargrave*, and contended, that here being three persons designated *nominatim* nakedly to execute a power, the

* *Vaughan*, 262. † 2 *Peere Williams*, 309.

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common law rule applies, and there can be no survivorship. And upon the note by Lord *Hale*, cited by *Hargrave*, and the confirmation which the latter thinks it receives from the cases in *Kelw.* 44, and 2 *Brownl.* 194, which Mr. *Hargrave* cites as authorities that a power of selling given to executors shall pass to their executors and administrators: he said he had examined the reports, and they were only *dicta*, and not decisions. The latter is a *dictum* of *Winch*, in the case of *Rowles* v. *Mason*, when *Coke* himself was *chief justice*, and assisted in the decisions which took place in *Trinity*, 10 *Jac. I.* A. D. 1612, and yet in his Commentary,* which was not published till 1628, he lays down a contrary doctrine, which ought therefore to prevail."

PEAKE, in reply. "It is admitted that the words have the sense which the *plaintiff* gives them, or they have no meaning at all, and the executing of the will in the presence of three witnesses, though necessary to raising the question at all, shews in some degree an intention of passing lands. In common language, a trustee *ex vi termine* is supposed to have some trust to perform, and the words of inheritance vest in him the inheritance in the land. *Markham* v. *Cooke* was rather a stronger case, for there was something to rebut the presumption, unless it was necessary to give a fee for the purposes of the trust. In *Taylor* v. *Webb*, though the direction concerning the title-deeds was mentioned in the argument, yet it was not relied upon in the judgment. The devise of 200l. a year, in addition to the jointure, must mean out of an estate of the same kind; and the argument is only strengthened by applying the devise to the term for 200 years. The cases of devises by implication are only cited to shew that there may be

* Ut Supra.

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an estate by implication, although there is no express devise of an estate to the person in whose favour it is implied. *Yates* v. *Crompton* was only a decree that the heir at law should be made a party *ex majori cautela.*"

Cur. adv. vult.

We have heard this case argued; we have considered it; and it appears to us, attending to the whole of the will, that the testator, *J. Trent*, in appointing *J. Hanning*, *Wm. Hanning*, and *Constantine Phipps*, as trustees of inheritance, for the execution of his will, plainly meant to make them trustees of his estate of inheritance in the same manner as if he had used the words "trustees of my inheritance, or trustees to inherit my said estates for the execution of this my will." We are, therefore of opinion, that the said *John Hanning*, *Wm. Hanning*, and *Constantine Phipps*, took an estate in fee in remainder in the said real estates of the said *John Trent*, subject to the term of 200 years created by the settlement 1st *December*, 1805.

ELLENBOROUGH,
N. GROSE,
S. LE BLANC.

The rule of law being, that the intent of a testator to disinherit his heir at law, must be clear, and appear plainly in his will, otherwise his heir shall not be disinherited; the question submitted to the consideration of the court will depend upon this, viz. Whether such intent doth so appear? and I do not think that it does. For the testator has not made any mention of his lands, nor has he in any manner referred to them; the addition to his wife's jointure is not charged upon them, and that part of his will may be well satisfied if his personal estate be the fund for paying it. The giving his wife 200*l.* a year in addition to her join-

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ture, is but the giving that sum over and above the jointure, and it will not be the less an addition to it, if it be payable from a different fund. The legacies to the children are given in terms as general as possible. The principal ground on which it has been contended that the testator devised his lands for the payment of them is furnished by that part of the will which appoints certain persons to be trustees of inheritance, for the execution thereof; which expression, though it may furnish ground to conjecture that the testator meant that they should take his real estate, to enable them to execute his will, is, in my opinion, too uncertain to have such effect as was contended for on the behalf of the *plaintiffs*. The use of any expression made so inaccurately, as it cannot but be admitted this has been, without any circumstance to fix and mark its sense and meaning, and that by a person so ignorant of legal forms as the testator appears to have been, will not, I think, authorize the court to say that it must be understood with reference to his real estates. The word "inheritance" may have been supposed by him to be more generally applicable to things personal than it is, when properly used; or that the mode in which, things real and personal are transmitted to those who, as the representatives of their owners, are entitled to them on their deaths, was an acquisition by inheritance as much in the one case as in the other; or he might suppose that things personal would descend to an heir; or he might mean by the expression he has used to point out those whom he meant to succeed to the trusts of his will, on the deaths of the persons he had named; and that in their heirs those funds should be vested, which, without charging his real estate, would be applicable to satisfy the bequests to his wife and children. And I think it will be going much beyond any of the cases, which are to be found in our books, to hold that this will, in any way, affect the real estates of the tes-

tator. And I am, therefore, of opinion, that *John Hanning, William Hanning,* and *Constantine Phipps* did not take any estate or interest in the real estates of the said *John Trent,* under and by virtue of his will, and that they had not, by virtue of his will, a power to make any conveyance or appointment of any estate or interest of or in such real estates.

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S. LAWRENCE.

IN THE EXCHEQUER.

LANE (Assignee of JONES, an insolvent Debtor) *against* CHANDLER.—*May* 27, 1805.

Pleading. Insolvent debtor. Stat. 41 Geo. 3, c. 70. Issue on several facts. Bankruptcy.

Action of covenant by the assignee of an insolvent debtor, under the 41 *Geo. III.* c. 70, *on a covenant with the latter to pay him* 120*l. on the death of A. B. The* defendant *pleaded an assignment thereof by way of mortgage for* 61*l. to C. previous to the assignment to the* plaintiff, *which mortgage became forfeited, and that C. gave notice thereof to the* defendant. *He also pleaded, that before the assignment,* Jones *became indebted in* 100*l. and was a bankrupt, and that a commission issued, and that the insolvent was found a bankrupt, and his effects were assigned, &c.* Replication, *that the sum due on the covenant exceeded the sum in the mortgage: and to the plea of bankruptcy, the* plaintiff, *admitting the commission and the finding of the commissioners, and their assignment, traversed the residue of the plea. Held, upon general demurrer to the former plea, and special demurrer, for a multifarious traverse, to the latter, that the* plaintiff *might recover the surplus of the money due beyond the mortgage, and also, that the residue of the plea of bankruptcy made but one point of defence, and might well be put in issue together,*

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THIS was an *action* of *covenant,* brought by the *plaintiff,* as assignee under the statute 41 *Geo. III.* c. 70, of one *Jones,* an insolvent debtor, on a deed dated the 26th of *August,* 1795; whereby the *defen-*

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dant covenanted, on the death of *J. G. Baylis*, to pay to *Jones* 120l. which, though the event had taken place, he had failed to do. To this the *defendant* pleaded the following pleas, 1st, *non est factum*; 2d, an assignment by *Jones* to one *New*, dated the 23d of *November*, 1795, of the sum sued for, by way of mortgage, to secure the repayment to *New*, of 61l. 10s. 6d. and interest, lent to *Jones*; which assignment was also stated to contain a power of attorney to *New* to sue in the name of *Jones*, and also a proviso for redemption upon payment to *New* of 61l. 10s. 6d. on the 24th day of *December*, 1795. The plea then stated that the money was not paid on the day. Whereby all right and title of *Jones* in the 120l. became absolutely vested in *New*, of all which *New* afterwards, to wit, on the 20th *April* 1803, at, &c. gave the *defendant* notice. 3d, That before the assignment of *Jones*'s effects to the *plaintiff*, *Jones*, being a trader, became indebted in 100l. to one *W. Hobbins*, and became a bankrupt, and on the 7th of *April*, 1798, a commission of bankrupt issued against *Jones*, and he was thereupon found a bankrupt; and the commissioners, on the 27th of *April*, 1798, assigned his effects by deed, for the benefit of his creditors, to certain assignees, whereby such assignees became and were entitled to the residue of the money, and the cause of action in the declaration mentioned; 4th, a plea of set off.

REPLICATION, that at the commencement of the suit, there was and is due to the *plaintiff*, assignee as aforesaid, upon the covenant of the *defendant*, for the residue of the said 120l. and interest, a large sum of money, to wit, 100l. which exceeds the said sum of 61l. 10s. 6d. in the said indenture in the second plea mentioned. To the third plea, the *plaintiff* replied, admitting the issuing of the commission

of bankrupt, and that the commissioners found *Jones* a bankrupt, and that the assignment was made of his effects, but nevertheless traversing the residue of the facts mentioned in that plea, and concluding to the country. On the plea of *set off*, the *plaintiff* took issue, and the *defendant* demurred generally to the replication to the second plea, and to the replication to the plea of bankruptcy, the 3d plea, the *defendant* demurred, assigning for cause, that the replication endeavoured to join and put in issue various distinct matters of fact which ought not to be joined and put in issue together. The *plaintiff* thereupon joined in the demurrer.

In Trinity term, 1804,

JERVIS, for the *defendant*, in support of the demurrer, made two questions; first, whether the *plaintiff*, who is the assignee of an insolvent debtor under the stat. 41 *Geo. III.* c. 70, is entitled to recover, from a debtor of the insolvent a sum of money, which was assigned by the insolvent, before his insolvency, to a third person for a valuable consideration? And secondly, a question of form, whether the replication to the third plea is not multifarious, by reason of its attempting to put in issue various distinct matters of fact, each of which might be made the subject of a distinct traverse? "In support of the first objection, it is not necessary to contend that a *chose en action*, as this debt is, can be assigned, so as to entitle the assignee to maintain the action in his own name: but the question here is, whether this assignment would have entitled the assignee to recover the debt in the name of the assignor; or whether it did not constitute the assignor a trustee for the assignee, so as to prevent any interest from passing to the *plaintiff* as assignee under the insolvent act. Courts of equity have always held such assignments to be good, and that notwithstanding the assig-

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nor afterwards became a bankrupt. *Unwin* v. *Oliver*,* and *ex parte Byas*.† Courts of law have also taken notice of trusts in many instances, as in *Bottimley* v. *Brook*,‡ and *Rudge* v. *Birch*."¶ He relied, however, principally on the case of *Winch* v. *Keeley*,‖ as being precisely in point. There it was held that the assignor of a *chose en action* who is become a bankrupt may sue the debtor for the benefit of the assignee. Now here the title of the *plaintiff* is similar to the title of the assignees of a bankrupt; and on the construction of the stat. 1 *Jac. I.* c. 15, s. 13, it has been held, that such things as a bankrupt holds as a trustee do not pass under his commission. Here is an assignment of the whole debt, with a condition for making the same void, which has not been performed, and therefore the assignment is now absolute, and there is a power of attorney to the assignee to sue in the name of the assignor, which is not revocable, being a power coupled with an interest. It must also be an assignment of the whole and not of a part only; otherwise it would tend to a multiplicity of actions."

WALTON, *contrà*. "As to the first question; the assignment of a *chose en action* cannot be pleaded or taken notice of at law,§ and the plea of the assignment to *New* is an insufficient bar. This case is different from that of *Winch* v. *Keeley*, because here the assignment is to secure a less sum than the debt from the *defendant* amounted to, and it is so confessed on the pleadings. Therefore there is an equitable as well as a legal right in the money vested in the insolvent, and consequently in his assignee; whereas the ground of the decision in *Winch* v. *Keeley* is, that the bank-

* Cited by Lord *Mansfield*, in 1 *Burr.* 481. † 1 *Atk.* 124.
‡ C. B. M. 22 *G. III.* Cited in *Winch* v. *Keeley*, 1 *T. Rep.* 621. ¶ *Ib.* 622. ‖ *Ib.* 621. § *Co. Litt.* 214, *a*.

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rupt had no interest legal or equitable. At the most there is only a *lien* in *New* on the money covenanted to be paid when it is recovered by the *plaintiff*. By the Insolvent act, 41 *Geo.* III. c. 70, all the personal estate and effects of the debtor are vested in the clerk of the peace, who is to make an assignment to a creditor; and there is a proviso that it shall not hinder any mortgages, charges, or liens upon the estate of such debtor, or his personal estate or effects, but such liens shall be first discharged. In the case of *Bottimley* v. *Brook*, the whole debt, secured by the bond sued upon, was in trust for *E. Chancellor*, and his debt was therefore allowed to be set off. But this case was much doubted, and there is no prior case in which a trust has been taken notice of at law. The cases on this head were cited in *Bowerman* v. *Rhadenius*,* and were treated as anomalous cases, and the admission of a party on the record, though a mere trustee, was there held to defeat the action, and the doctrine that courts of law should take notice of equitable rights although they are at variance with the legal rights, was disapproved of. On the 2d point, as to the traverse, the replication in point of fact only puts in issue one point, namely the bankruptcy of the *plaintiff*, on which the whole plea is founded. The first resolution in *Crogate's* case,† is that '*absque tali causa* in trespass refers to the whole plea, and not only to the command, for all makes one cause. And in false imprisonment, if the *defendant* justify by a capias to the sheriff, and a warrant, then *de injuria sua*, &c. is no good replication; for then the matter of record will be parcel of the cause, for all makes but one cause, and matter of record cannot be put in issue; but in such case he may reply *de injuria sua*, and traverse

* 7 *T. Rep.* 663. † 8 *Co.* 67.

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the warrant, which is matter of fact. But upon such a justification by force of any proceedings in the admiralty court, hundred, or county court, or any other which is not of record, there *de injuria sua* generally is good, for all is matter of fact and makes but one cause.' So in *Robinson* v. *Raley*, Lord *Mansfield* says, It is true, you must take issue upon a single point; but it is not necessary that it should consist of one fact. The traverse to the plea there was that the cattle were the *defendant*'s own cattle, and that they were levant and couchant on the premises, and commonable cattle. And *Yates*, arguing upon the demurrer, defended the traverse, because, though it included several matters, yet they all made one defence; and it was held good."* He cited also *Chancey* v. *Winne*,† *Jones* v. *Kitchin*,‡ and *Taylor* v. *Markham*.§

JERVIS, in reply. "*Bauerman* v. *Rhadenius* was a question of evidence merely; whether the evidence or admission of the *plaintiff* upon the record, who was a trustee for a third person might be given in evidence to defeat the action; and it has by no means overruled the cases of *Bottimley* v. *Brook*, *Rudge* v. *Birch*, and *Winch* v. *Keeley*, which are mentioned and relied upon by *Butler*, J. in *Masters* v. *Miller*.‖ The assignment by way of mortgage was necessarily an assignment of the entire debt, and it is therefore immaterial whether the security is commensurate with the debt or not. He contended also that there was no substantial difference as to this case, between the statute 41 *Geo. III.* c. 70, and 1 *Jac. I.* c. 15. It is true, *Jones* might have released the debt, but that is an inconvenience to which all actions in the name of a trustee must be

* 1 *Burr.* 320. † 12 *Mod.* 580. 1 *Ld. Raym.* 700. *Salk.* 628. ‡ 1 *Bos. & Pull.* 80. § *Cro. Jac.* 224. *Bro. Abr. tit. de son tort demesne, pl.* 49. ‖ 4 *Term Rep.* 341.

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subject. As to the case of *Robinson* v. *Raley* the *defendant* there could have no right of common except for his own cattle, which must be commonable cattle; and *levancy* and *couchancy* was but the measure of his right of common; so that the traverse in that case actually consisted of only one fact, whether the *defendant* had a right of common for those cattle. But here there are three distinct matters of fact, which are attempted to be put in issue, namely, the trading, the petitioning creditor's debt, and the act of bankruptcy. By the same rule, the *plaintiff* might also have further attempted to put in issue the commission of bankruptcy, which is not matter of record, and the assignment. Therefore as the *defendant* could not have pleaded the bankruptcy of the *plaintiff* generally, but was obliged to state all the necessary particulars of the bankruptcy, the replication, according to the rule in *Crogate's* case, ought to have selected one of the facts so pleaded and have taken issue upon that fact alone.

Cur. adv. vult.

And now, on the 27th of *May*, 1805,

The LORD CHIEF BARON delivered the judgment of the court to the following effect; after stating the pleadings, his lordship said, "As to the first demurrer, there can be no reason why the *plaintiff* should not recover the surplus due on the *defendant*'s covenant, beyond the amount of the sum secured by the mortgage to *New*, even if at law the court could take notice of the assignment of a *chose en action*. The great point made has been on the traverse to the plea of bankruptcy; on the ground that it put in issue several matters, namely, the trading, the petitioning creditor's debt, and the act of bankruptcy, admitting the commission of bankruptcy and the assignment. But we

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think the case of *Robinson* v. *Raley** decides the point clearly with the *plaintiff*. There *Yates*, who was then at the bar, argued, and the court adopted his position, that several facts might be put in issue, if they all made only one point of defence. In that case, the issue on the right of common, as taken in the pleadings, put three circumstances or facts in issue; 1st, Whether the cattle were *levant* and *couchant*? 2d, Whether they were the party's own cattle? and, 3dly, Whether they were commonable cattle? But all this, as one entire defence, was allowed to be traversed altogether. So here, all the circumstances of the bankruptcy make but one entire defence, and the plea is therefore not multifarious. Here no specialty of record is involved in the traverse. We think therefore that there should be

JUDGMENT for the PLAINTIFF.

The *defendant*'s counsel prayed leave to amend, because he said, the bankruptcy could be established, and was a bar to the action; which the court, in order to let in the justice of the case, permitted him to do, on payment of costs.

LAMBERT *against* BENNET. 22d *November*.

Demise. Exception. Water-mill.

A. leaves a fulling mill, together with a water-course and floodgates, to a trustee for 99 years if either his daughter or wife should so long live, for their use, and in order to make provision for them; with an exception of free liberty for the lessor, his heir, &c. his servants and tenants, at all times, at pleasure, to divert the water from the mill, for watering all meadows which they should think proper, and to take up, and put down all proper

* 1 Burr. 316.

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shires. Part of the profits of the mill consisted of water-rents, for flooding meadows, for water which was wholly diverted from the mill. Held, that, by the exception, the heir of the lessor was entitled to the water-rents, the exception not being repugnant to the grant.

THIS was an action of assumpsit for money lent, paid, had, and received, and an account stated, to which the general issue was pleaded; it was tried before the Honourable Mr. *Baron Graham*, at the summer assizes at *Salisbury*, 1805, when a verdict was found for the *plaintiff*, damages 63*l.* 2*s.* 10*d.* costs 40*s.* subject to the opinion of the court on the following case:

This action was brought by the plaintiff against the defendant, for 63*l.* 2*s.* 10*d.* *received by him under the following circumstances:*

On the 24th *November*, 1800, *Edmund Lambert*, esquire being seised in fee of the mills and premises hereinafter mentioned to be demised, and having then the *plaintiff*, his eldest son and heir at law by his deceased wife, and *Lucy Lambert*, now the wife of the *defendant*, then an infant by his then wife and now widow *Bridget Lambert*, by a certain indenture bearing date on that day, and made between the said *Edmund Lambert*, of the one part, and Sir *William Peirce Ashe A'Court*, Baronet, of the other part, duly executed by both parties, after reciting that he, the said *Edmund Lambert*, was *desirous of making such provision for his infant daughter, Lucy Lambert, and his wife Bridget Lambert*, as hereinafter mentioned, but subject to a proviso for vacating the same during his life, did demise, lease, and grant unto the said Sir *William Peirce Ashe A'Court*, his executors, administrators, and assigns, all that fulling mill in *Boyton* aforesaid; together with the watercourse, floodgates, floodgate pill, with free ingress

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egress, and regress, in and to the same; and also one close, formerly called the Mill Barton, but then called the Little Ground, and one other close called the Mill Garden, and also one seat, or room for a man and woman to sit in, within the church of *Boyton* aforesaid, and all ways, passages, and privileges to the aforesaid premises; belonging (except and always reserved out of the said lease or demise, unto the said *Edmund Lambert*, his heirs and assigns, all timber trees, germins, saplings, plants, and springs, likely to become timber, which during the term thereby granted should stand, grow, or be in or upon the said demised premises, or any part thereof, with free liberty of ingress, egress, and regress, to fell, cut down, root up, take, load, and carry away the said exceepted trees; and also except all right of fishing in and upon the said demised premises, and every part thereof, and the sole and exclusive liberty of exercising and enjoying the same, *and also except full and free liberty to and for the said Edmund Lambert, his heirs and assigns, and his and their servants and tenants, at all times, at his and their will and pleasure, to divert and turn the water, running or which should run, to or from the said mill, out of the usual course for the drowning, flooding, and watering all such meadows, as he or they should think proper, and to take and draw up and shut down all proper and necessary sluices and hatches for that purpose, without any let, denial, or interruption of or by him the said Sir William Pierce Ashe A'Court, his executors, administrators, or assigns.* To have and to hold the said fulling-mill, mill-house, and all and singular other the premises thereinbefore mentioned, and thereby demised, and every part and parcel thereof, with the appurtenances (except as before excepted) unto the said Sir *William Pierce Ashe A'Court*, his executors, administrators, or assigns, from thenceforth for and during, and unto the full end and term of ninety-nine years

next ensuing, fully to be complete and ended, if the said *Lucy Lambert* or *Bridget Lambert*, or either of them, should so long happen to live, upon trust, nevertheless for, and for the sole and only proper benefit and behoof of the said *Lucy Lambert* and her assigns, for and during so long of the said ninety-nine years as she should happen to live, and from and after her decease, upon trust for, and for the only proper benefit and behoof of the said *Bridget Lambert* and her assigns (in case she should happen to survive the said *Lucy Lambert*,) for and during so long time of the same term as should run out and expire during her natural life, and to and for no other trust, intent, or purpose whatsoever; yielding and paying therefore, yearly and every year during the said demised term, unto the said *Edmund Lambert*, his heirs or assigns, the yearly rent or sum of twenty shillings of lawful money of *Great Britain*, clear of all deductions and taxes whatsoever, on the tenth day of *October*, and the fifth day of *April*, by even and equal portions. On the same day a similar lease of the same date was executed between the same parties of another mill, called *Sherrington Mill*. The only variation between the two leases is, that the latter is at a rent of three pounds, instead of twenty shillings; and in the description of the premises the word *mill-pond* is used instead of the word *water-course*. *Edmund Lambert*, the lessor died in *March*, 1802, without vacating either of the same leases, under the proviso therein, leaving the *plaintiff*, his heir at law, who thereupno became seised in fee of the reversion of the above mentioned demised premises; *Lucy*, his daughter, who had before married the *defendant*, *John Bennett*; and *Bridget* his wife, surviving him, all of whom are now alive. Sir *William A'Court* entered and was possessed of the leasehold premises above mentioned, subject to the trusts above declared. A considerable part of

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the profits of the mills above mentioned arises from what are called water-rents, which are payments made by the occupiers of meadows (not being tenants either of the *plaintiff* or *defendant*, or Sir *William A'Court*, under the lease) watered by permission from the leits of these mills, above the same, in consideration of their having such water. These meadows have been always watered by the same means, and the amount of the water-rent paid per acre has been always the same. Part of the water so let from *Sherrington Mill* does not, after the meadows are watered, come back into the mill-stream again. The *plaintiff* has in his own occupation, and in the occupation of his tenants, other meadows which they have always since Mr. *Lambert's* death, watered from these streams above the mills, whenever they chose, during the watering season, without making any payment or acknowledgment whatever. *Edmund Lambert*, the lessor, after granting the leases above mentioned, until his death, always received the water-rents to his own use. Water rent accruing since Mr. *Lambert's* death, to the amount of the sum given by the verdict, have been paid by different occupiers of meadows, (not being tenants as aforesaid) to *Ambrose Patient*, as a stake holder; who paid them to the *defendant*, claiming them in right of *Lucy* his wife, upon his undertaking to pay them over to the *plaintiff* in case he should appear to be intitled to them. The persons who paid the water-rents so paid by them to *Patient* as aforesaid, had permission both from the *plaintiff* and the *defendant*, and Sir *William A'Court* his trustee to have the water for watering the meadows for which such water-rents were paid. The question for the opinion of the court is, whether the *plaintiff* is intitled to recover? If he is, the verdict is to stand; if not, a nonsuit is to be entered.

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MOORE, A. *for the plaintiff*. "The question is, whether the *plaintiff* is to recover the water-rents, for watering all the meadows stated in the case; which depends upon the construction of the third branch of the exception in the lease, coupled with the other facts. This lease must be construed strictly against the lessor, though according to the intent of the parties; and it is not confined to the meadows that were in the lessor's own possession. It does not appear by the deed, whether the rent of the mill, as well as the water-rents of the meadows, was not paid to the lessor: it is then a case of strict construction between the heir at law, and the lessee of the ancestor. The profits of the fulling mill might have been a very sufficient provision, and it might not have been his intent to have given any thing more than the rent of the fulling mill." He cited *Doe d. Dormer* v. *Parkhurst*.*

DAMPIER, *contrà*. "It was the intention of the lessor to have provided for his family by this arrangement, and to give a beneficial interest to the lessee. He had meadows of his own, and also water-rents to be received of other persons, who were tenants to him: these water-rents are stated to be great part of the profits of the mill. Now the water must be at the controul of the miller, or else the exception will be destructive of the grant, for, during the time of watering the meadows, all the water must be taken away from the mill."

THE COURT held, that unless the exception went to destroy the matter of the grant, it was large enough to include the water-rents, and that the most that could be inferred from the case was, that the use of the water for watering the meadows would partially deprive the mill of the use of the water, or at the

* 3 *Atk.* 136.

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utmost would wholly deprive it of the use of the water for a part of the year. The exception therefore not being inconsistent with the grant, there was

JUDGMENT for the PLAINTIFF.

RANDALL *against* RANDALL.

Award. Attachment. Condition.

Where a submission to arbitration is of several specific things, so that the said award be made in writing by a certain day, or of the premises, or other words equivalent to a condition, the arbitrators must award, specifically, concerning the things so mentioned, without further notice, or the award is bad for the whole, and no attachment can be obtained for the non-performance of it.

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THIS was a rule to shew cause why an attachment should not issue for non-performance of an award; which was opposed upon a defect appearing on the face of the award. The agreement mentioned in the condition of the bond of arbitration was, to arbitrate of and concerning all matters in difference, and also of and concerning the value to be paid for certain hoppolls, &c, " and also the rent to be paid by the said *William Randall* to the said *James Randall*, for the lands, secondly, hereinafter mentioned, together with the costs in the said action, so that the award should be made in writing ready to be delivered on or before the 12th day of *May* instant." In the award no notice was taken of the rent to be paid annually, mentioned in the condition of the bond of arbitration, which had been made a rule of court, and was referred to in the award. The parties had lands in *gavelkind*, which were wholly occupied by one of them only, and it was intended that the award should be made of the annual rent to be paid by the occupier to the other tenant, for the time which he held it. The arbitrators awarded general releases, and recited, that they had considereed *all* matters referred.

COMYNS, in shewing cause against the rule, cited *Roll*

Ab. title *Arbitrament*, L. 256. *Middleton* v. *Weeks*,* *Bespoke's case*,† *Ormelade* v. *Coke*,‡ *Bradford* v. *Bryan*,§ and *Risden* v. *Inglett*,‖ to shew that where the submission states certain particulars for the arbitrators to award upon, with an *ita quod*, that the award be made in *writing*; although the words concerning the premises are omitted, the arbitrators must take notice of the special matter so submitted to them, and make an award upon it; and it is not necessary for the party complaining of the award to give further notice of the subject in dispute, than that which is contained in the submission. Here the arbitrators had neither awarded an annual rent, nor even directed that the land should be given up, but had wholly omitted to notice it."

ESPINASSE, *contrà*, contended that the award was good for the residue, it being only bad in part.

Lord ELLENBOROUGH, C. J. "The arbitrator was to decide on three things, particularly mentioned, and he has decided upon one of them only. He could not have better information of the matter in dispute than the recital of the condition of the bond, and *non liquet* that the parties would have submitted the other articles to his arbitrament unless they had submitted this also. Now the authority was conditional by the *ita quod*; namely, on the condition of awarding on those three premises, and if they fail in doing so the award falls all together. 'The said award to be made in writing' is the same as *ita quod*, and it is by no means analogous to the cases in which awards have been held good in part and bad in part."

LAWRENCE, J. "I doubted at first whether there might not have been found some modern case, that was

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* *Cro. Jac.* 200. † 8 *Co. Rep.* 98. ‡ *Cro. Jac.* 355.
§ *Willes*, 270. ‖ *Cro. Eliz.* 339.

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subversive of the doctrine in the cases cited, upon the ground of an award being good in part, and bad in part; but as there has been no such case cited, we must presume that none such exists. Under the terms of this submission, if the arbitrators do not determine before the day mentioned, and determine all the matters mentioned in the submission, the condition is not performed. Unless therefore we were to overturn the cases, we cannot decide but that this award is bad."

GROSE, J. and LE BLANC, J. of the same opinion.

RULE for the ATTACHMENT DISCHARGED.

THE KING *against* THE INHABITANTS of LONG BUCKLEY. *November 20th.* 1805.

Settlement. Evidence. Indenture. Apprentice.

The production of an Indenture of apprenticeship is sufficient evidence of apprenticeship duly effected by indenture, without shewing the payment of the duty upon the apprentice fee, after 20 years, for that may be presumed; neither is it rebutted by shewing that there is no entry of payment of such duty in the book of the receiver of the duty; for non liquet, *but he might have neglected to enter it.*

THE KING *versus* the Inhabitants of LONG BUCKYLE.

UPON appeal to the quarter-sessions at *Northampton* from an order of two justices for the removal of *William Lee*, his wife and four children, from *Long Buckley*, in the county aforesaid, to *Newport-Pagnell* in *Bucks*, the said court ordered the said order of removal to be quashed, subject to the following case: The pauper, *William Lee*, who was the illegitimate son of *Mary Lee*, was born in the said parish of *Newport-Pagnell*, A. D. 1774 or 1775, and was bound apprentice by indenture to *John Dickens*, of *Long Buckley* aforesaid, shoe maker, for seven years, for a premium of 12*l.* which was paid; and the said indenture regularly executed by the pauper, his mother, and

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Dickens, the master with whom the pauper served the full time in *Long Buckley* aforesaid. There was but one indenture executed, which, after the expiration of the said seven years, was given to the said pauper, and which was proved to have been lost. For eleven or twelve years last past, the pauper had resided constantly at *Long Buckley*, and during that time had been often relieved by the parish of *Long Buckley*, and received towns-money from it, which towns-money was given away at *Christmas* to parishioners. No further evidence was given in support of the appellant's case; but for the respondents, it was proved by the deputy register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium stamp, or inrolled, from the year 1773 to the 19th of *July*, 1805. The counsel for the respondents insisted that the appellants ought to have given further proof of the payment of the duty, and of the inrollment; but the court were of opinion, that after the length of time elapsed they might presume that all had been rightly done, and quashed the order of removal. The pauper did no other act to gain a settlement.

DAYRELL, in support of the order of sessions, was stopped by the court.

MORRICE, *B. contrà*. "The presumption in favour of the indenture from length of time was rebutted by shewing that the duty had not been paid, and that was clearly established from the proof that no entry of the payment of the duty existed at the head-office in *London*, where an entry would have appeared if the duty had been paid."

By THE COURT. "If the officer did his duty, the receipt of the stamp duty would appear, but he might have received it and not entered it. The question was merely, whether the presumption might be rebutted

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by this negative evidence, and the court of quarter sessions has drawn the right conclusion, for it does not appear but the officer might have been negligent in his duty, and the parish had relieved the pauper for several years.

ORDER of SESSIONS *quashing* the *order of justices* AFFIRMED.

The KING *against* the Hon. Mr. Justice JOHNSON.—Nov. 23d, 1805.

Libel. Evidence. Publication, proof of.

A libel written in Dublin, *and received in* London *from an unknown hand, with the* Dublin *post-mark, was published in* Middlesex *in the form of letters, which contained internal evidence of a request by the writer to the publisher to publish them in* Middlesex. *Held, upon a trial at bar, upon probable evidence of the loss of the* envelopes, *and probable evidence of their being received by the* post, *that this was a publication by the writer living in* Dublin, *by his agent in* Middlesex, *and sufficient evidence of publication, both to authorize the reading of the libel and to go to the jury, upon an indictment charging the publication in* Middlesex, *the hand-writing of the* defendant *to the letters being proved by persons acquainted with its character.*

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THE *defendant* was indicted for a libel,* and was this day tried at bar, before all the judges of this court. The publication of the libel was charged to have been in the county of *Middlesex* in the form of a series of letters on the affairs of *Ireland* under the signature of *Juverna*, in the publication called *Cobbett's Weekly Register*. The proprietor, *Cobbett*, proved the publication of the libel in his Register.

He first received a letter with the *Dublin post-mark* inquiring whether it would be agreeable to him to

* See 2 *Smith's Rep.* 591.

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receive from *Ireland* certain useful and true information respecting public affairs in that country; and desiring him, in case it should be so, to say where such communications should be addressed. And in his next number he did say, that they should be directed to Mr. *Budd's*, No. 100, *Pall Mall*. He afterwards received two letters, being the libels in question, under cover directed as above, which were sent on to him by Mr. *Budd*, one dated the 28th *October*, the other the 2d *November*, 1804. They were both under cover. The cover of the first of the 28th *October* was broken open by Mr. *Budd*; the letter of the 2d *November* was delivered with the cover unbroken. The first letter, the witness said, he had no doubt was destroyed, as were the covers which enclosed the libels. He did not recollect by whose hands *Budd* sent them to him. He had no certain knowledge of the covers being destroyed, nor of the first letter being destroyed. Part of the first letter was printed in the Register, but a part of it, which desired him to answer the writer, through the Register, as if he, the correspondent lived at *York*, in order to elude the vigilance of the *Dublin post-office*, was omitted. He had not searched for them since. He had been looking into the drawer where the papers were thrown as others were, and he knew that he had never seen them. And he believed that the office was searched, and that at the time the letters were received the covers were torn off and thrown into the fire. But he had not made any recent search for them, and supposed them to have been so disposed of, from its being his usual custom to destroy them.

This the Court held to be sufficient probable evidence of the destruction of the covers and of the first letter, so as to let in parol evidence of their nature.

Evidence was then given by several witnesses, that

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the libels produced were in the hand-writing of the *defendant*. This evidence was merely from the inspection of the character of the hand-writing, as in the common case of proving a bill of exchange.

The counsel for the prosecution then proposed to read the libel.

Adam, Park, Lockhart, and Richardson, for the *defendant*, objected to reading the libel. Upon the proof there is no evidence to go to a jury that there has been a publication in *Middlesex* by the *defendant*. For the purpose of the argument it must be admitted that the libels were written in *Dublin* by the *defendant*, and they may probably contain internal evidence of an *intent* in the author to publish them in *Middlesex*, by sending them to Mr. *Cobbett*; but that is the utmost which the writings themselves establish. They might have been stolen from the *defendant*'s bureau and transmitted by some other person to *London* through the *Dublin* and *London* post-offices. There is no evidence that they passed even through the post-office, except from the supposed post-mark observed by *Cobbett* on the cover, and there is no evidence that the cover was written by the *defendant*. *Cobbett* did not know how the letters were delivered to *Budd*, nor who delivered them to him. Nor has *Budd* been called to prove that he received them by the conveyance of the post. This amounts therefore, at the utmost, to proof of intention to publish by the *defendant* living at *Dublin*, but it is no actual publication, by his agency and procurement, in the county of *Middlesex*. They cited and relied upon the case of the *Seven Bishops*,* wherein it was first proved that the 'Lord Archbishop

* *Hargr. State Trials, vol. 4, p. 397. Trial of the Seven Bishops, by Mr. Justice J. Powell, p. 171.*

and all the *Bishops* did own the petition to be subscribed by them; which they owned at the Council Table at *Whitehall.*" The venue was laid in *Middlesex*, and the counsel offered this as evidence to obviate the objection of the county, as there was no other proof of publication in the county of *Middlesex*; but the Court held it insufficient, and then Lord *Sunderland* was called in to prove an actual publication, by the bishops delivering the petition to the king at St. *James's*; and the Court there held that the owning of their hands did not amount to a publication.

The ATTORNEY and SOLICITOR GENERAL, ERSKINE, GARROW, WOOD, and ABBOTT, after stating, that from the internal evidence of the letter itself, it would appear that the *defendant* therein desired Mr. *Cobbett* to publish it in *Middlesex*, were stopped by the Court.

Lord ELLENBOROUGH, C. J. "If this paper writing had only been found in the study of the *defendant*, he never could be convicted for a libel. There is nothing in the judgment which the Court is about to pronounce on this point, that will over-rule, nor any thing that will tend to over-rule, nor is any thing meant to over-rule the doctrine laid down in the case of the Seven Bishops; but it is most extraordinary that it did not occur to any gentleman, that there is no question as to the publication here, for the publication is unquestionably by Mr. *Cobbett*, in the county of *Middlesex*; and the question is, what in any other case would be indisputable, whether Mr. *J. Johnson*, who is bound by any act which he procures to be done, is, supposing him to have procured it, responsible for this publication? and the question then is, has the *defendant* procured it? And, surely, frequent and important evidence on that subject, whether the *defendant* applied to Mr. *Cobbett* to publish, is to be collected from the papers themselves, and now we are called upon,

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to say there has been no procurement, before we have read this paper, to see whether there has been this procurement or not. Whether there was or was not such procurement, is matter fit to be left to the jury. As to the case of the Seven Bishops, those most reverend and moral persons were called upon to say, before they knew that a prosecution was to be commenced, whether the petition was their writing. The honourable feelings of those virtuous persons, thus called upon, in the presence of their sovereign, to own what they did, had a great effect. Some were supposed to answer, that they had committed the crime; but it was a species of confession extorted, and which could not stand before a court of justice, constituted as that court was; and the evidence of my Lord *Sunderland* was called for; and then it was held, there was evidence to go to the jury, to say, whether they did in fact deliver a paper to his majesty, and solicit his majesty to receive it. Perhaps there was then evidence. I incline to think it was evidence to go to the jury. But what was the paper itself? A libel? No; it was a fair, decent, loyal remonstrance to his majesty, praying that he would be graciously pleased not to enforce his authority in the exercise of an important prerogative of the crown, by commanding his most reverend subjects to conform to his will, by reading his royal proclamation. This petition was indeed called a libel; but was that a libel? No; but where is the analogy between that case and this? Here is a paper, which every body admits to be a libel, published in the county of *Middlesex*; and if the thing be a libel, as undoubtedly it is, the only question is, whether the *defendant* procured it to be published in the county of *Middlesex*. I will not observe on the communication which took place, by letter, previously inquiring how the future correspondence should be directed,

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and even how he should subscribe his own. I think there may be, as the *Attorney General* has stated, (and he would not be misleading the court, in stating, that something is in the libel which is not to be found in it), internal evidence of the thing now in question, which would be manifested by the reading of it; so that if we were to refuse putting it to the jury, we should be defeating the ends of public justice. The question is, whether Mr. *Cobbett* published this libel by the procurement of the *defendant*? If he did, the offence is established; for by the law of the land, the publication is as much the act of the person who procures it to be done, as it is the act of him who does it. God forbid we should violate any of the principles of the case of the Seven Bishops, or any other on which the rights and liberties of the subjects of this country so much depend! We are not violating any principle whatever of law and justice, or the practice of courts of justice: we are proceeding in the fair open path of our public duty, in receiving, and therefore we ought to receive, this evidence, and lay it before the jury for their consideration."

Grose, J. "I am of the same opinion."

Lawrence, J. "I am also of the same opinion. The case of the Seven Bishops has no analogy to this. They were prosecuted for a petition which was presented to the king, which petition it was thought fit in those days to call a libel. It was framed in Lambeth Palace, and delivered to the king; but where delivered to the king did not appear; and in order to fix a delivery to the king in the county of *Middlesex*, inferences were attempted to be drawn from confessions. But *hand-writing* in the county of *Surrey* was all that was *proved*, or rather it was admitted by some of the Bishops. Now it would be extraordinary that a hand-writing admitted in a county could be taken as proof of publication in that county; and that was all the proof in that case, except

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that of one of the bishops having the petition in his hand when he asked an audience of the king in council, in the county of *Middlesex*; which confession was charged to be a publication in the county of *Middlesex*, of which there was not one tittle of proof. That case, therefore, has no analogy to this. Here is proof of a publication in the county of *Middlesex*, proof of the paper having come to the hands of Mr. *Cobbett*, in the county of *Middlesex*; and the question is, whether or not this *defendant* sent it to Mr. *Cobbett*. Mr. *Cobbett* having received previous letters, inquiring whether or not it would be agreeable to him to have communication of this sort, and there having been an advertisement in his Register, that it would be so, Mr. *Cobbett* receives, in the hand-writing (as it stands at present) of the *defendant*, Mr. Justice *Johnson*, these manuscripts. Whether the paper so received be or be not of the hand-writing of the *defendant*, whether or not it was sent by the *defendant*, or by another person, are questions surely for the jury to exercise their judgment upon. The paper must, therefore, be read. How they will exercise that judgment is another matter.

LE BLANC, J. "I am of the same opinion. Previous communication in the county of *Middlesex*, from whom is not now the question, is proved to have taken place with the witness *Cobbett*, desiring to know whether letters respecting the public affairs of Ireland would be acceptable to him, and if so, where they should be sent to. In answer to which a public communication is made where they are to be sent to, which is followed by the reception of the letters now before us. I do not speak of the direction; the letter itself stands at present proved to be in the hand writing of the *defendant*. It is objected that there is no proof that these letters came by the post, or by what means they came; whether they came by the post, or by a private hand, stands at present, subject to answer and observation,

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perhaps not very doubtful, but they appear to be, upon the evidence at present before us, of the hand-writing of the *defendant*; and, supposing them to be so, it is to be collected by the jury, and by them determined, whether with intention to be published or not? They are delivered in the county of *Middlesex* to Mr. *Cobbett*. I cannot entertain a doubt, that this is evidence to be sent to a jury; what conclusion they will draw is another question. In the case of the Seven Bishops, the publication was not proved; the fact was admitted by some of them, that they were the authors of the petition to the king, but proof of the publication was wanting."

The counsel for the crown then gave further probable evidence, by re-examining Mr. *Cobbett*, of the probable destruction of the first letter and the covers.

The libel was then read. Evidence was given on the part of the *defendant* to shew that the hand-writing was not his, and not like his; and the verdict was

GUILTY.

SMITH *against* PAULL.—Nov. 26.

Practice. Term's Notice of Proceeding.

After proceedings being delayed a year, a term's notice of executing a writ of inquiry is sufficient; without giving a term's notice of intending to proceed, and then a notice of executting the writ. It is therefore not necessary to give a term's notice of intending to proceed, but a term's notice of the next proceeding.

A RULE being obtained to shew cause why the execution and proceedings thereon should not be set aside for irregularity, in having executed a writ of inquiry after a year's delay in the proceedings, without giving a term's notice of intending to proceed;

HULLOCK shewed cause. He cited *Barnes*, 291,

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and said that it had been held that notice of trial given between the essoign day and the first day of the term for trial after the term, was good. Here the notice was given on the 11th day of *May*, 1805, for executing the inquiry on the 8th day of *July* 1805; a term elapsed between the interval, and he contended that a term's notice of any step to be taken in the cause was sufficient; and that it was never necessary to give a term's notice of the intention to take any step in the proceedings. The general question in all the cases was only, whether a full term had elapsed or not, between the notice and the proceedings.

On the other side, it was contended, that there should have been a term's notice of intending to proceed, and then the *plaintiff* should have given the usual notice of executing the inquiry.

Lord ELLENBOROUGH, C. J. "There is no case that there should be a term's notice of intention of proceeding. If you were to give a term's notice of giving notice of inquiry or of trial, you might be out of time to give notice of trial after *Trinity term*, and so lose the whole vacation.

RULE DISCHARGED on this ground, but afterwards granted upon terms.

Inferior Courts. Lords' Act. Prisoners.

The KING *against* the BAILIFFS of IPSWICH.—Nov. 26.

The Lords' acts apply to inferior courts, but debtors in execution on processes issuing therefrom, must apply to be discharged, within the next term after being charged in execution, calculated by the terms in the superior courts as known in the calendar.

POOLEY obtained a rule to shew cause why a *mandamus* should not issue, directed to the bailiffs of the town and borough of *Ipswich*, requiring them to make a rule, or order, to cause *Robert Arnold*, a prisoner in execution in their gaol, to be brought up before

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them at a court of *Small Pleas* for the said town and borough, and to grant to him the benefit of the several acts of parliament made for the relief of debtors with respect to the imprisonment of their persons. The *defendant, Arnold,* being in custody for 18l. 2s. 2d. gave notice the 21st of *September,* 1805, of his intention, after fourteen days, to petition the court to be holden on the 7th of ———, to grant him the benefit of the act 32 *Geo. II.* c. 28; 26 *Geo. III.* c. 44; 33 *Geo. III.* c. 5; and 37 *Geo. III.* with the usual affidavits and schedule. At a court held the 7th of October, 1805, the application was accordingly made, and the court was prayed to grant a rule for the *plaintiff* to shew cause why he should not be discharged. By the gaoler's certificate, it appeared that the prisoner was charged in execution upon a *ca. sa.* out of the said court, returnable the 8th of *April,* 1805. The prisoner, by affidavit, alleged before the said court that he had not applied before, because he had been informed that no prisoner in the said borough gaol could be entitled to the benefit of the said acts. The said court, upon hearing the attornies, were of opinion that the statutes applied only to the superior courts, and refused the *defendant* the benefit of the acts. It appeared that the said court is not at all governed in its practice by any reference to the terms by which the process of the superior courts is regulated, and the court-days are every other *Monday,* and processes are made returnable on those days.

ALDERSON shewed cause, and contended that the acts did not apply to the case of a prisoner in an inferior court, and that if they did the prisoner was not entitled to his discharge, having delayed to apply to the court beyond the first term after being charged in execution.

WILSON and POOLEY, *contrà,* contended that the

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words of the acts applied generally to all prisoners in all courts, and that the *defendant Arnold* was within the clause, which allows the debtor to be brought up at any time after, upon shewing to the court that his neglect arose from ignorance or mistake.* They contended also that the limitation, as to the next term, could not apply to a court where there were no terms.†

Lord ELLENBOROUGH, C. J. "If the prisoner appears by the acts to be otherwise entitled to his discharge, it is too much to say that by the use of the word *term* he is deprived of it. The statute of the 2 *Geo. II.* c. 22, s. 8, is without a limitation; and the 3 *Geo. III.* c. 27, relates especially to the courts at *Westminster Hall* and the assizes. The 8 *Geo. II.* c. 27, introduces for the first time the mention of the word *term*. This is an extraordinary limitation of time, and a very strange term used with respect to inferior courts and their process; but, unless there is some absolute inconsistency, the limitation of the statute must be observed. Construing, however, all the acts together, we are willing to do what is most beneficial to the subject, and though I doubted at first as to the inferior court

* 33 *Geo. III.* c. 5, s. 5.

† The material words of the stat. 32 *Geo. II.* c. 28, upon which the question principally arose, were as follows, "If any person shall be charged in execution for any sum not exceeding, &c. and shall be minded to deliver up, &c. it shall be lawful for any such prisoner, *before the end of the first term next after he shall be charged in execution*, to petition any court of law from whence the process issued, upon which he was so taken and charged in execution, &c." "And if such court shall thereupon be satisfied of the regularity of every such notice, such petition shall be received; and such court shall thereupon, *by order or rule of the same court*, cause the prisoner so petitioning, to be brought into the same court.

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bringing the prisoner up, 'by order or rule of court;' yet it may do what is equivalent. It is indeed limited to the term after the being charged in execution; but as there is a discretionary power of enlarging that time, upon particular circumstances, vested in the court out of which the process issues, there is no impropriety in granting a *mandamus* to bring the prisoner up before the inferior court, for his case to be there examined and heard."

GROSE, J. was of the same opinion.

LAWRENCE, J. "The 8 Geo. II. c. 22, gives a general power to discharge, upon application to the courts out of which the process issued. And by the 8 of Geo. II. c. 22, the application is confined to the next term. It is impossible that the word term could apply to the practice of the inferior courts, but it is still as known a period of the year as if it were said 'within three months,' and it is clearly, therefore, only a denomination of the period in which the party must be brought up.

The rule was therefore made absolute for a writ directed to them to have the prisoner brought before the said bailiffs, and to inquire into the cause of his delay, and grant relief if the prisoner should appear to them duly entitled.

The KING *against* the COMMISSIONERS of SEWERS for the County of SOMERSET.—*Nov.* 25.

Sewers. Jurisdiction. Presentment. Jury.

The commissioners of sewers, under stat. 23 *Hen. VIII. c.* 5, *must present the lands of levels, &c. to be benefited by sea-walls, &c. by juries summoned upon a precept directed to the sheriff, and by him summoned from the body of the county. And where such a jury was by custom summoned by a precept to the sheriff, who issued a precept to the clerk to the commissioners, to summon the* foreman *of a standing jury, summoned by the sheriff at the commencement of every new commission, and all of whom acted for*

life, or until removed for good cause, within a certain district, called a view, and resided there, and were liable to be rated there, and such a jury was summoned to inquire of lands to receive benefit by a sea-wall there erected; such jury being interested, and being also without jurisdiction, their presentment was held absolutely void. The jury presenting must also be sworn in court, and present upon the testimony of witnesses; and where such standing jurymen were only sworn upon entering on their offices, or appointing a new foreman, it was held bad. Neither is the want of jurisdiction waved by traversing their presentment. The traversing jury must also be of the body of the county. But standing juries may be allowable to assist the view of the commissioners.

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THIS was a rule to shew cause why the several proceedings of the commissioners returned into this court upon a *certiorari* should not be quashed.* In *Easter* term, 43 *Geo. III.* a writ of mandamus issued to the commissioners, to make a rate on all persons who had lands, &c. within the *Level* of *Huntspill*, and which might have any disadvantage by the sea there, for want of a sufficient repair of a sufficient sea-wall, or who had any benefit from preventing inundation, for repaying, to the Marquis of *Buckingham* and others, money expended and paid to *R. Symes*, collector, beyond their proportions, under a decree of the said commissioners of the 29th of *June*, 1799. In *Hilary* term, 1804, an attachment was granted for not making such rate, but not enforced. By precept from the commissioners, the sheriff was commanded to summon the foreman of the several juries of *Huntspill*, &c. and such foreman was summoned accordingly, by virtue of a precept from the sheriff to the clerk of the commissioners to issue warrants in the sheriff's name. A court of sewers was held the 28th of *May*, 1804, and a standing jury

* The proceedings were very voluminous, consisting of 81 brief sheets.

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for the parish of *Huntspill* appeared. Whereupon the chairman charged them to return the persons and lands, in their parish, of the said level, receiving benefit or avoiding damage from the sea-wall; to do this with the assistance of one *Chilcott*, who had been appointed surveyor by the above decree; to hear evidence as to each person's property, and present a list accordingly, without regard to the necessity of the wall or the sum to be raised, but only to return all persons and lands that had benefit or avoided damage. And the court was adjourned to the 9th of *June*, at *Bridgwater*; and after a similar charge, *Chilcott* being sworn, gave in a list of the persons liable, which he had previously made out, and this was implicitly adopted by the jury, who annexed it to their presentment. In another case of the *Pawlett* jury, the presentment was delivered ready signed before *Chilcott*'s evidence was closed. Upon which the chairman informed them that they were finding contrary to evidence, but the jury persisted, and the court was adjourned to the 31st day of *August*, when the example of the *Pawlett* jury was followed by that of a jury for the parish of *Puriton*. Whereupon one *Jeffrey*, one of the persons who claimed to be repaid, traversed the presentments; which came on to be tried afterwards before juries summoned from the body of the county. Evidence was thereupon heard on both sides, and without the chairman summing up, the presentment for *Pawlett* was affirmed; and nearly the same jury being sworn upon the traverse for *Puriton*, the same proceedings were had. A precept was then demanded and obtained, for a jury out of the body of the county to make presentments, in order to make a rate; and at a court of sewers at *Bridgwater*, 20th *October*, 1805, when the same was to be made, the said jury was dismissed, the court saying, they were advised that they had no right to employ them to make a return of

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lands in the level; and the standing juries for the several parishes were ordered to be summoned. At a court the 3d of *November*, the chairman told the jury to make the presentment according to their own and the best information they could collect, and a presentment was delivered for *Chilton* parish, previously prepared and signed, and the commissioners, saying they could not compel jurors to hear evidence, they (the jurors) refused to hear any. Other juries also refused to hear evidence. The presentment for *Shapwick*, one of the parishes in which the lands lay, was drawn up and presented in the hand-writing of one *Parsons*, a commissioner, against whom the attachment was directed; and each of the juries were severally attended and assisted by an attorney. Objections were taken to the presentments not defining the lands or limits of the district sufficiently. *Edward Symes*, an attorney for some of the juries, after objections were taken, and it had been recommended by some of the commissioners that some of the jurors should alter some of these presentments in the particulars above-mentioned, refused to do it, and said that they were settled by counsel. On the 23d of *November*, 1804, sixty traverses of the presentment for *Huntspill* were entered by *Symes* and others, as attornies, without producing any authority in writing from the owners of lands for whom they appeared, although they were requested so to do, and although objection was taken as to the length of time elapsed. It was suggested also, that traverses were entered on the behalf of some of the jurors themselves who had signed the presentment, namely, for *Way*, *Hawkins*, and *Board*, of *Huntspill*. An advertisement was published in the *Bath Chronicle*, in *August*, to summon a meeting of all the landholders, for the purpose of opposing the rate, and the affidavits suggested that combinations were formed and subscriptions were entered into for that purpose, by a large body of persons so in-

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terested, and that on the 28th of *August*, 1804, and at other times, meetings were attended by several of the commissioners who had not acted, but who were apprised of the mandamus. They were also attended by some of the standing jurors, namely, *Moore*, of *Mark*, and *Card*, of *Burnham*, who joined in the presentment of the 9th of *November*. This fact was not denied. The expence of such opposition to the rate was agreed to be paid out of the poor rates, and written agreements were signed at a meeting held in *July*, 1800, to oppose all the proceedings of the commissioners of sewers for enforcing the rate, which agreements were signed by several of the jurors who joined in the presentments for the several parishes. A further agreement was signed on the 3d of *September*, 1804, by several of the same jurors, to defray the expences incurred by *Payne* and others, solicitors. The evidence given by *Chilcott*, on the traverses to the *Pawlett* jury's presentment, proved that the lands were very extensive, and likely to receive great damage by the equinoctial tides, and that a field of one of the jurors on that presentment was liable to be very much injured.

In support of the presentments, it appeared, from the affidavit of the clerk to the commissioners, that the practice has been immemorially, that, when a new commission issues, the commissioners issue their precept to the sheriff to summon juries, which are summoned by the sheriff accordingly, and a foreman is chosen by the commissioners, on appearing at the next court of sewers. That they are composed of persons residing in the neighbourhood of their respective views, as being most competent to the office; and are sworn "diligently to inquire and present all defaults, impediments, and annoyances, of, or by water found within their view. And also all such other matters and things which they, as jurymen of such juries, ought to present as long

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as they continue in that office, without any concealment." That the juries consist of various numbers, according to the extent of their views, and are in many instances not confined to one parish. That the view of each jury is well known. That they are always composed of persons living within the parishes or districts where the lands in view lie, and continue in office until death, or until discharged by the commissioners for infirmity, or some other good cause, when a new juryman is chosen and sworn in. That being once chosen, it is never usual to reswear the jurymen excepting when a foreman is chosen. That the same practice was pursued, except that the said *Huntspill, Pill*, and other juries, were resworn, but in other respects the juries followed the same rules as had heretofore been pursued respecting the returning of presentments. When the matter of any presentment hath been disputed, it has been usual for the person disputing the same to traverse the presentment, which traverse being entered, the commissioners of sewers issued their precept to the sheriff of the county, requiring him to summon a jury to try such traverse, and it was accordingly summoned from some other part of the county, avoiding to summon parties interested in the matter in dispute. That such proceedings were followed on the trial of the traverse of the presentments for *Pawlett* and *Puriton*, and no instance was ever known of trying a presentment before a court of sewers otherwise.

Several jurors filed affidavits denying combination, setting out their respective views, and stating that they never knew jurors present any thing out of their views; and that *Mills*, an eminent engineer, was employed to view the Level of *Huntspill*, which contained 4000 acres, and he declared, that the lands in the *Huntspill* view could not be affected by any inundations of the sea, for want of a sea-wall for *Hunts-*

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pill, nor could receive benefit by the erection thereof, and that the presentment was founded upon such opinion and the jurors' own knowledge."

The commissioners submitted to the direction of the court, and stated, that the jury being summoned from the body of the county, the under-sheriff returned a list of the jurors; but it appearing to them, that it was expected that the said jurors would be required to view all the lands in the Level of *Huntspill*, and to assess such as were liable to the expence of repairing the sea-wall, and they having been advised that no precedent had occurred where such jury had been impannelled and sworn for such purpose, and that they had no power to compel them to act as jurors for that purpose, they dismissed the jurors accordingly. They further said, that the interference of *Symes* and others, as solicitors, in preparing the presentments, and the advertisement, and the meetings and agreements, were unknown to them, and that since the mandamus they were desirous of obeying it.

To these proceedings the following objections were taken, viz. that the jurors were holders of messuages, lands, &c. within, and inhabitants of the parishes and places for which they served, and were therefore interested. 2dly, That the juries were the ordinary standing and viewing juries; whereas, a jury ought to have been by order of the commissioners summoned by the sheriff of the county, for the special purpose of presenting persons liable to contribute to the burthen in question. 3dly, Some of the presentments state, that no person holds any lands, &c. *within the view of the jurors*, in the parish of, &c. which would have hurt, or receive benefit, &c. 4thly, That the jurors, in some of the presentments, describe themselves to be jurors for one parish or place, and yet they present for other places also. The two first objections affected all the presentments; the two latter applied only to a certain number of them.

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TRIPP appeared for the commissioners, and admitted that the proceedings were entirely by mistake, and said that they ought to have proceeded, as it is said in *Callis* on *Sewers*, 105, 106, 108, upon view, by survey themselves, and by surveyors properly appointed, and by presentment of the juries from the body of the county upon the neglect of the surveyors.

There was some expectation that the matter might be compromised by submitting the whole to the arbitration of Mr. *Tripp*. But this not being effected,

PELL, PEAKE, and A. MOORE, shewed cause, relying upon the *Pawlett* and *Puriton* presentments. The practice appeared to be, to make presentments for certain limits well known to the standing juries. The practice of courts of *sewers* is acknowledged and adopted by the statute 23 *Henry VIII.* c. 5, and such presentments are not conclusive, but may be traversed. From their local knowledge these standing juries are very well fitted for such inquiry. In *Styles*, 185, 191, 192, the want of *Hundredors*, upon the jury, was objected to as shewing that they had not sufficient authority. The objections to the presenting juries are now waved by the lapse of time, for objection ought to have been taken to them before the traverses were had; but by traversing their presentments, the parties admitted them to be good in form. They cited *Callis*, ed. 1681, p. 110; *Moor*, 825, pl. 113; and *Viner, Sewers*, 418, pl. 1.

The SOLICITOR GENERAL, BURROUGH, and NEWBOLT, *contrà*, were stopped by the court.

The COURT censured the conduct of the jurors, as being very unlike judicial proceedings; but was desirous of deciding only upon the legal and formal objections. The standing juries might, for many purposes of assisting in the view of the commissioners, be unobjectionable, but not for making presentments, being themselves interested in the matter. Here the juries were

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not summoned by the sheriff, but only the foreman of the jury; and in the case in *Styles*, there was no doubt but the jury was to be summoned by the sheriff. This was a defect of jurisdiction which could not be waved or cured by consent. When a jury of the county was summoned and had appeared, they should not have been dismissed, but upon being sworn, should have tried the traverses or presentments upon evidence, and not by the information of *Mills*, the engineer, in the country, who was not upon his oath.

RULE ABSOLUTE for quashing the proceedings.*

LANE *against* SMITH.—16th Nov.

Practice. Pleading. Separate counts on several notes.

Where there is a count on each of several notes of a banker, payable to bearer, the court will not strike them out as superfluous, and put the plaintiff *to the inconvenience of proving the consideration, on the count for money had and received.*

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THE *plaintiff* declared in *assumpsit* upon several notes of a banker payable to bearer for 1l. each. There was a count for each note, making in the whole 235 counts, with a count for money had and received.

SCARLETT, for the *defendant*, obtained a rule to shew cause why it should not be referred to the master to strike out the superfluous counts; on the ground, that the notes would be evidence on the count for money had and received.

The SOLICITOR GENERAL, for the *plaintiff*, shewed cause. He contended that the *plaintiff* ought not to be put to the difficulty of proving the consideration of the notes, at the trial; for he might be turned round if it should appear not to be for money had and received;

* It was at one time suggested by Lord ELLENBOROUGH, C. J. that it would be advisable to try the question upon some general traverse: it was stated by BURROUGH that it was found impossible.

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and that there would be a convenience in declaring upon the notes; as, upon judgment by default, the *plaintiff* might take out execution without a writ of inquiry.

Lord ELLENBOROUGH, C. J. "I should have drawn this declaration in the same form; the *plaintiff* ought not to be put to any unnecessary difficulty in his proof."

RULE DISCHARGED.

NIXAN *against* BLAND.—*Nov.* 26.

Pleading. Debt on Assumpsit.

A declaration in debt on a quantum meruit, *stating that the* defendant agreed to pay *so much, &c. is good, being similar to a* concessit solvere; Aliter, *if,* undertook *and* faithfully promised, *which sounds in assumpsit.*

NIXAN *versus* BLAND.

THE *plaintiff* declared in debt for use and occupation, &c. with a count upon a *quantum meruit*, stating that, in consideration that the said *plaintiff* had, at the request of the *defendant*, before that time done and performed certain work, &c. for the *defendant*, to be paid for, &c. the said *defendant* then and there *agreed to pay* for the same, so much, &c. whereby an action hath accrued, &c.

To this the *defendant* demurred specially, alleging for cause, that the *plaintiff* had joined a count in *assumpsit* with counts in debt.

The case being put in the common paper,

SMITH, for the *defendant*, applied to have it placed in the special paper for argument, relying upon the authority of *Dalton* v. *Smith*,* and contended, that the words '*agreed to pay*' in this count, were equivalent to the words *promised and undertook to pay* in that case, and therefore sounded in assumpsit and not in debt. He stated also, that the best modern precedents contained no words of agreement or promise.†

* 2 *Smith's Rep.* 618. † See *Wentworth's Pleadings*, Vol. 5, p. 145, et seq. Drawn by Mr. *Lawes* and Mr. *Barrow*.

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But by the COURT. "It has been the practice to declare in *debt* upon a *concessit solvere* for two hundred years at least; and this is no more. Unless there is a case in which a similar declaration has been held bad in this precise form, there must be

JUDGMENT for the *defendant*.

Ex parte JOHN KING, a Prisoner.—*Nov.* 28.

A bankrupt was a prisoner in the Fleet, for a greater sum than 1,500*l. on the* 1*st of* January, 1804; *part of it was for a debt due to a creditor who was allowed, by the* Lord Chancellor, *till the first dividend, to elect whether he would proceed at law, or under the commission, and before the* 1*st of* January, 1804, *that creditor signed his commission, and afterwards, in* January, 1805, *by consent, a judge's order was obtained to discharge him out of custody pro tanto, by which the debts wherewith he was charged were reduced to less than* 1,500*l. Held, that the prisoner was legally in custody on the* 1*st of* January, 1804, *for more than* 1,500*l. and not entitled to the benefit of the Insolvent Act* 44 Geo. III. c. 108.

Insolvent act 44 Geo. 3. c. 108. Execution. Bankrupt. Judge's order.

Semble, a judge will not discharge a defendant *out of execution, alone upon the* plaintiff *having signed his certificate, without the consent of parties.*

Ex parte KING.

THIS was an application for a *mandamus*, directed to the lord mayor, recorder, and aldermen of the city of *London*, being the magistrates of the court of quarter sessions for *London*, to make an order that *John King* should be brought before them; and for them to inquire whether he was in prison for the non-payment of any sum or sums of money greater than 1,500*l.* on the 1st of *January*, 1804, and if it should appear that he was not, then to hear and determine whether he is entitled to be discharged under the Insolvent Act, 44 *Geo. III.* c. 108. The statute requires gaolers, &c. to make out lists of persons in their custody upon the 1st of *January*, 1804, charged in execution, &c. and by section 4, "Every person

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who on the 1st day of *January*, 1804, was charged in any prison, for the non-payment of debts, &c. which did not on the whole amount to a greater sum than 1,500l. and whose name shall be inserted in any such list to be delivered in as aforesaid, taking the oaths thereby directed to be taken, and performing what on his part is required to be done, shall be discharged out of custody," &c and have the benefit of that act. The affidavit, on the part of *King*, stated that *King* was first imprisoned in the Fleet, in execution, for the sum of 2,300l. and upwards. In *April*, 1802, he was declared a bankrupt, and in *Trinity* term, 1802, Messrs. *Pollard* and Co. charged him in execution for 1,152l. debt and costs due before the bankruptcy. Upon petition to the *Lord Chancellor* in *April*, 1803, Messrs. *Pollards* were allowed to prove this debt of 1,152l. being for part of the sum for which *King* was in execution, if they should elect so to do before the first dividend. This debt was proved before the first of *January*, 1804. On the 12th of *December*, 1803, before a dividend was made, they signed his certificate, and thereby made their election. On the 23d of *January*, 1805, the *defendant* obtained a judge's summons to shew cause why he should not be discharged out of custody, at the suit of Messrs. *Pollards*, for 1,152l. debt and costs, and an order was accordingly made the 23d of *January*, 1805, whereby, " by consent of the attorney for the *plaintiffs*, it was ordered that the *defendant* should be discharged out of custody at the suit of the *plaintiffs* for such sum," they the *plaintiffs* having proved their debt, and signed the certificate under his commission. The *defendant King* applied to the court of quarter sessions to be discharged under the Insolvent Act, statute 44 *Geo. III.* c. 108.; but the court held, that they had not the power to discharge him, he having been actually in custody on the 1st of *January*, 1804, charged in execution for a greater sum than the sum of 1500l. mentioned in the act.

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ERSKINE, for the prisoner *King*, now contended that the *plaintiffs*, Messrs. *Pollards*, having signed the certificate and elected to proceed under the commission before the 1st of *January*, 1804, to which period the discharge upon the judge's summons in 1805 must have relation, *King* was not legally in custody at their suit on that day, and therefore was not legally in custody for more than 1,500l, and was entitled to his discharge, for there was an end of *Pollard* and Co.'s proceedings at law when they signed the certificate.

LAWRENCE, J. "How could that order, in strictness, have been obtained? A judge never discharges a bankrupt out of custody upon one person's having signed his certificate, but upon all or the greater part of the creditors signing, and the certificate being allowed. That order ought to be set aside."

Lord ELLENBOROUGH, C. J. "All that was necessary to be stated in the order was the consent of the *plaintiff*'s attorney; all the rest is surplusage. Then was it not actually a debt at law, under which the prisoner *King* was in execution at the suit of *Pollard* and Co.? He was therefore in execution for a greater sum than 1,500l. on the 1st of *January*, 1804: although, by the consent of the parties, at a future time, he might have become indebted in a less sum. I do not see any reason to interfere by *mandamus* with the magistrates.

RULE REFUSED.

BRADSHAW *against* SADDINGTON.—*Nov.* 28.

Practice. Affidavit of Debt.

"*Justly indebted to the* plaintiff *in* 100*l. upon and by virtue of a certain bill of exchange drawn by the* defendant, *and long since due and unpaid,*" *is sufficiently certain to hold to bail, and it is not necessary to state whether the* plaintiff *is payee or indorsee.*

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THIS was a rule to shew cause why the *defendant* should not be discharged out of custody upon filing common bail, upon the following objection to the affidavit, to hold to bail, viz. that the affidavit stated that "the *defendant* was justly and truly indebted to the *plaintiff* in the sum of 100*l.* and upwards, upon and by virtue of a certain bill of exchange, drawn by the said *defendant*, and long since due and unpaid."

ESPINASSE shewed cause, and cited *Coppinger* v. *Beaton*,* where an affidavit of debt for money had and received "to the use of the *plaintiff*," omitting "by the *defendant*," was held good.

LAWES, *contrà*.

By the COURT. "The affidavit sufficiently states the cause of action, and it is unnecessary to state the particular character in which the *plaintiff* holds the bill. If he is not entitled to hold it, the affidavit is false."

RULE DISCHARGED.

ANONYMOUS. ATTACHMENT.—Nov. 28.

Practice. Attachment. Last day of term.

A rule nisi *for an attachment cannot be obtained on the last day of term.*

Anonymous.

ESPINASSE moved for a rule to shew cause why an attachment should not issue against an attorney for non-payment of costs. And he stated that he understood the practice to be, that on the last day of term, a rule to shew cause for an attachment might be obtained, although it could not be obtained absolutely.

The MASTER certified to the Court that it was not usual to grant it, even *nisi*, on the last day of term.

RULE REFUSED.†

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* 8 *Term Rep.* 338.

† On the last day of *Hilary Term*, 1806, *Espinasse* inquired, again, the practice, in this respect, of Mr. *Card*, the

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REES *against* MANNERS.—Nov. 29.

Coram ELLENBOROUGH, C. J. at *Nisi Prius*, at *Westminster*.

A contract with an advertising taylor for four suits a year, and to return the old suits, is not provable under a count for goods sold; it is a special assumpsit.

Semble. It includes a contract for mending the suits.

Assumpsit. Pleading. Contract for clothes by the year.

THE *plaintiff* declared for goods sold and delivered, &c. namely for divers suits of clothes and materials, with other counts for work and labour, &c. He was an advertising taylor, and one of his bills was produced with the following head:—"The nobility, gentry, and the public served with new clothes at the following low rates *per annum*, on the return of those left off."

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And it was proved that the *defendant* contracted by the year for four suits *per annum*, at seventeen guineas. The *plaintiff* also proved some mending done. The *defendant* was arrested shortly after the first three or four months of the year.

Lord ELLENBOROUGH, C. J. gave the following charge to the jury. "If it be a contract for the use or wear and tear of four suits of clothes *per annum*, paying either quarterly, or at the end of the year, the *plaintiff* cannot recover on the declaration which he has now proceeded upon. There is also a charge for mending, and it will be a question whether a man who contracts thus by

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deputy clerk of the rules, who returned for answer that a rule *nisi* had been allowed in Lord KENYON's time, but that the practice is otherwise now.

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the year is not also to mend. The *defendant* was to have four suits a year at seventeen guineas. One of the witnesses says, that Mr. *Rees* accepts nobody as a customer that will not pay quarterly; but it does not appear that it was so in this case, only that it was his usual practice. The *plaintiff* then endeavours to shew that the *defendant* made a promise to pay something before the year expired, and to give a bill at 60 days; but, if there was no liability to pay, that would not give a right to demand on the part of the *plaintiff*, for in that case, his promise was *nudum pactum*. The action should have been brought, in special *assumpsit*, at the expiration of the year (whereas this is in the middle of the year) to recover 17*l.* 17*s.* for the use and hire of the clothes, and also the value of the clothes which were not returned. I do not believe there was a quarterly agreement that is not proved; but if there was afterwards a promise to pay quarterly, not being previously liable, it could not be a good promise in this case."

VERDICT for the *defendant*.

END OF MICHAELMAS TERM, 1805.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH.

IN HILARY TERM,

In the 46th Year of the Reign of Geo. III.

SALT, one, &c. *against* RICHARDS and Others, in Error.—*Monday*, 27th of *January*, 1806.

When a Writ of Error *in the* Exchequer Chamber *is non-prossed for want of a transcript, the* Defendant *in error is not entitled to costs under the statute* 3 Hen. VII. c. 10.

Error. Costs. Non pros. Practice.

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DAMPIER moved for a rule to shew cause, why the *defendants* in error should not be allowed their costs of the *non pros* signed by the clerk of the errors.

The *defendants* in error brought their original action in this court, and obtained final judgment the 11th of *July*, 1805. Whereupon, and before execution, the *plaintiff* in error brought a writ of error, returnable in the *Exchequer Chamber*, directed to the chief justice of the *King's Bench*. On the 26th of *Nov.* 1805, a *non pros* was signed by the clerk of the errors for not transcribing. The costs were about 3l. If the parties had proceeded in the court of *error* the *defendants* would have obtained their full costs, upon the judgment being affirmed. After the service of the allowance of the writ of *error* if no bail is put in, the record is certified; in order

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to which, a transcript should be made out and sent with the writ of *error* to the *Exchequer Chamber* on the return of the writ of *error*. And if it is not certified in due time, the *defendant* in *error* gives the *plaintiff* in *error* a rule to transcribe; and if neither is performed in due time, the *defendant* in *error* signs judgment of *non pros*;* and the officers of the court have doubted whether they could allow costs on this *non pros*, under the statute 8 *Hen. VII. c.* 10; which enacts, that "if any *defendant* sue afore execution had, any writ of *error* to reverse any judgment in delaying of execution, then if the judgment be affirmed in the said writ of *error*, or the writ of error be discontinued in the default of the party, or any person who sueth a writ of *error* be *non-suited* in the same, the said person against whom the *error* is sued, shall recover his costs and damage for his delay and wrongful vexation in the same, by the discretion of the justice afore whom the writ of *error* is sued."

COMYN, for the *plaintiff* in *error*, shewed cause in the first instance. "The word 'justice' is made use of instead of 'the court.'† Until the transcript comes to the court of *Error* the cause is not removed, and remains in the *King's Bench*. The writ of *error* is directed to the Chief Justice of the *King's Bench*, returnable in the *Exchequer Chamber*, which is the court afore whom the writ of *error* is sued, and not the court of *King's Bench*. This court, therefore, has no jurisdiction of the costs. Neither has the court of *Exchequer Chamber*, because the suit in *error* has not yet been

* *Tidd*, 1093, cites the Law and Practice in Errors, p. 3, and 146, n. cites also 2 *T. Rep.* 17. marg. He says in that case no costs are allowed.

† *Dougl.* 561. in 3rd Edit.

carried there. This is *casus omissus* out of the statute; and is like costs on quashing a writ of error before the 4 *Anne*, *c.* 16, *s.* 23.

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DAMPIER, *contrà*, contended that there would be in some sort a failure of justice if the court had not power to tax the costs.

BY THE COURT, there cannot well be said to be a failure of justice in not allowing costs under a particular statute, where it does not distinctly appear from the statute, that it intended to give these costs. It directs the costs to be given 'by the discretion of the justice'* *i. e.* the court afore whom the writ of *error* is sued. Now that cannot mean the court to whom the writ of *error* is directed, the Chief Justice of which, is only required to certify what has passed before it. Then this court is not the proper *forum* by which the costs are to be given. It can only mean either the court of *Chancery* out of which the writ of *error* issues, or the court of *Exchequer Chamber* where it is returnable. We think it means the latter. But the question is, whether the legislature meant to give costs, and we think it did not; for there is no cause in the *Exchequer Chamber* till the transcript.

RULE NISI REFUSED.

WILSON *against* KNUBLEY.—*Tuesday*, 28th *January*.

Pleading. Covenant. Stat. 3 W. and M. c. 14, s. 2, 3. Devisee. Fraudulent devise.

The statute 3 W. *and* M. c. 14, s. 2, 3, *against fraudulent devises, does not extend to make the devisee of lands liable in an action of covenant, but only to actions of debt.*

DECLARATION, *in covenant* against the *defendant*, surviving devisee of the lands, tenements, and hereditaments, which were of *John Lawson* deceased,

WILSON *versus* KNUBLEY.

* The LORD ELLENBOROUGH, C. J. enquired if the parliament-roll had been searched, to know if the original was *Justiciar*, which might mean *Justice* or *Justices*.

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there being no heir of the said *John Lawson*; stating an indenture of release between the said *John Lawson* and *Isabella* his wife of the one part, and the said *defendant* of the other; of a certain freehold messuage, &c. and other hereditaments, to hold to the *plaintiff*, her heirs and assigns, with a covenant that the said *John Lawson* was the true and lawful owner of the premises, and that they the said *John* and *Isabella*, stood lawfully and rightfully seised in his or her own right in fee-simple, and that the premises were free from incumbrances, and that they had power to convey; and a breach was assigned that they the said *John* and *Isabella* were not so seised of an indefeasible estate, with an averment that the *plaintiff* had been put to divers costs, &c. amounting to a large sum of money, to wit, to 1000l. in and about her defence to an ejectment brought in this court by *John Doe*, on the several demises of *Joseph Gardner* and *W. Ballentine*, against the said *plaintiff* and others, to recover a certain part of, to wit, an undivided third part of the said premises, the said *Joseph* or the said *W. Ballentine*, as a trustee for the said *Joseph*, being intitled thereto, and in and about purchasing such undivided share, and in making satisfaction for the rents and profits of such share, whilst the *plaintiff* held and enjoyed the same under the said indenture.

DEMURRER, with causes, that the said *plaintiff* hath declared against the *defendant* as the surviving devisee of the said *John Lawson*, deceased, upon breaches of covenant supposed to have been committed by the said *John Lawson*, deceased, in his life-time, and hath not joined the heir of the said *John Lawson* in the said suit and declaration. And, for that it appears, in and by the said declaration, that the said action of the said *plaintiff* is not brought against the said *defendant* as such devisee as aforesaid, for or in respect of any

obligation or other debt due from the said testator to the said *plaintiff*, but for and in respect of certain covenants of the said testator, supposed to have been entered into and broken by the said testator. And also, for that it is wholly uncertain what damages the *plaintiff* hath sustained, or may be able to prove, for or by reason of such breaches of covenant. And also, for that it is not averred or shewn in and by the said declaration, that any lands or hereditaments which were of the said *John Lawson*, deceased, at the time of his death, have come to the said *defendant* as such devisee, as aforesaid, or in any manner been in the hands of the said *defendant* as such devisee as aforesaid, out of which the said *defendant* may satisfy the damages if any such should be recovered against him as such devisee as aforesaid, by reason of the said supposed breaches of covenant in the said declaration mentioned.

YATES, *in support of the demurrer*, cited *Dyke* v. *Sweeting*,* "which was an action of covenant against the *defendant* as heir of his father, and not, as in this case, against a devisee." At common law no action would lie, in covenant, against a devisee. And the statute 3 *W.* and *M.* c. 14, s. 2 and 3, which gives the action against the devisee, does not extend to actions of covenant. That statute enacts "that all wills, limitations, or appointments, of or concerning any manors, lands, &c. whereof any person, at the time of his decease, shall be seised in fee-simple, in possession, &c. or have power to dispose of by his will, shall be deemed and taken, as against such creditors;" (*i. e.* by s. 1. creditors by bond or specialty, binding the heirs,) to be fraudulent, and clearly and absolutely void. And for the means, that such creditors may be enabled to recover their said debts, in the cases before mentioned, every such creditor shall and may have

* *Willes* 585.

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and maintain his action of debt, upon his said bond and specialties, against the heir at law of such obligor, and such devisee and devisees jointly by virtue of this act; and such devisee shall be liable and chargeable for a false plea by him or them pleaded, in the same manner any heir should have been, for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. The heir would, therefore, clearly have been bound, to answer in covenant, but not the devisee. And he noticed the cases in equity, where it had been a question, upon a devise for the payment of debts, whether the devisee took as devisee under the statute or not.

WOOD, *contrà*, "It must be admitted, that this case is not within the express words of the statute; but it is within the true spirit and meaning of it. It was the intent of the statute to make void, all devises, which were designed to prevent the heir from becoming answerable for all or any of the covenants by which the ancestor has bound his heir, and it is entituled 'a statute for the relief of creditors against fraudulent devises.' Is not then this case equally within the same mischief as if the covenantee had a bond from the devisor and his heirs for a penalty? In that case, he could only have had an action upon the bond to recover the amount of the damages. In the 3d section of the act, it is true, that an action of debt only is mentioned, which goes somewhat to shew, that covenant is not included: but the object of the statute was, that it should extend to all actions in which the real assets are bound. The heir would, clearly, have been bound: then here is an *hæres factus*, and he ought not to be placed in a better situation. All statutes to suppress fraud ought to have a liberal construction.*

* *Plowden* 59, *b.* 5 Co. Rep. 6.

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And it has been held, that the statute 4 *E. III. c. 7, de bonis asportatis in vita testatoris*, which enables the executor to bring an action of trespass for such things, enables him also, by the equity of the statute, to bring an action for other injuries to the testator; *Russel* v. *Pratt.** If this case is not within the statute, purchasers will be rendered very insecure, for it is the usual practice to take a covenant of this kind. As to the objection that the heir is not joined in the action, according to the 3d section of the statute, it is stated in the declaration, that there is no heir; and Lord Chancellor *Cowper* in *Gawler* v. *Wade*,† though he required the heir to be made a party to a bill, to subject the devisee of lands to the payment of a bond given by the testator, yet says, 'this is as an action at law; otherwise if there was no heir, and perhaps it might be otherwise too, *if* the bill had charged, that the *plaintiff* had made inquiry, and could find no heir; so that it is clearly unnecessary."

LAWRENCE, J. "The party, in that case, chose not to proceed at law, merely because the whole being devised away from the heir, he could recover nothing from him. But Lord *Cowper* said, that could be no reason for coming into equity, at least without joining the heir in the suit."

Lord ELLENBOROUGH, C. J. "The grievance, complained of in the preamble of the statute, existed in its full extent by the common law up to the statute 3 *W. c.* 17; and that grievance as stated in the preamble, of owners of lands defeating their specialty creditors by devises, would lead one to consider, that the legislature would have provided a more extensive remedy. It recites that 'it is not reasonable or just, that, by the practice or contrivance of any debtors the creditors should be defraud,

* 1 *Leon.* 193. † *Peere Will.* 99.

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ed of their just debts; and nevertheless it hath often so happened, that, that where several persons have by bond or other specialties bound themselves and their heirs, and have, afterwards died seised in fee-simple of and in manors, lands, &c. or had power to dispose or charge the same by their wills, have, to the defrauding of such their creditors, devised the same, or disposed thereof in such manner as such creditors have lost their said debts;' and then it afterwards provides the means of remedying the evil, which are more limited than the mischief that they before recited. But, that the means are intended to be limited to actions of debt, is plain; for they say, 'and for the *means* that such creditors shall be enabled to recover their said debts, be it enacted,' describing in terms the very means of remedy which shall be used, 'Such creditor shall have his action of debt upon his bond and specialty against the heir and such devisee jointly.' Then is this an action of debt? If the words had been only 'actions,' then it might have been contended for the devisee, that he was within the meaning. I do not say but there may be a case, perhaps, in which the heir and devisee may be joined upon a covenant; but that must be left for the time when such case shall occur. It is said that the legislature adopted the same latitude of expression as is used in the statute 4 *Ed. III. c.* 7. *de bonis asportatis in vita testatoris*; but there the words are 'action for a trespass done to the testator,' not action *of* trespass. That may therefore, be construed as 'a common wrong done to the testator.' The instance put by the legislature *de bonis asportatis in vita testatoris*, is one in which an action of trespass would be the proper remedy. But it seems to me, that we cannot embrace within the equity of the statute that which the legislature has always excluded, having stated the means which it should apply for the remedy of the

evil, and those means not including the case contended for, without doing violence to the *express* words of the statute.

GROSE, J. of the same opinion.

LAWRENCE, J. "This is an attempt to extend the application of the statute of the 3 *W. III. c.* 14. to an action, which is not within that statute. I should be inclined to give it the most ample construction, that the letter of it will bear, but the words of the 3d section, plainly extend only to an action of debt.—"For the means that such creditors shall be enabled to recover their debts."—This does not give a remedy for damages, which are not a debt; but this action is for damages upon a covenant, part of which damages are for the costs of an ejectment, and no person can say, that they were a debt. In the statute 4 *Ed. III. c.* 7, the words are very different; they are very loose and general compared with these. 'Item, whereas, in times past, executors have not had *trespass for* wrongs done to their testator.' The word trespass may there be construed as the wrongs of their testators. Here we cannot extend the words, although I cannot help thinking, that the legislature would have done better, if it had actually gone so far as to apply to this case."

His lordship in the course of the argument mentioned that a bond in a penalty might be taken to secure the performance of the covenant; but it does not appear from my notes, that he mentioned this, afterwards, in delivering his opinion; and I cannot be sure, that he meant to say, decidedly, that an action, upon such bond in a penalty, to secure damages upon a covenant, would be within the statute.

LE BLANC, J. "The argument is very strong to shew, that it would have been better for the legis-

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lature to have included this action, but I doubt whether it was in the contemplation of the legislature at the time, and this clause does not extend to covenant. It had been in their contemplation to have considered the case of a creditor that had only a claim for damages, and not a debt actually due, they would, I think, have made use of other words. Probably it was not; and if we should construe this act merely upon the equity of the statute, we should be going both against the intention of the legislature, and the express words of the statute.

JUDGMENT for the DEFENDANT.

PAYNE *against* WHALE.—*Jan.* 24.

Pleading. Warranty. Money had and received.

A horse being sold with a warranty, the purchaser went to return it for unsoundness, when the seller acknowledged, that he had warranted the horse sound, and would return the money if it were not so. Held, that this is proof of a warranty upon the original sale, but yet is merely a proposal towards an agreement to return the money, and is not evidence to enable the purchaser to recover upon a count for money had and received. He must proceed upon the warranty as before, for the unsoundness is still in dispute.

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THIS was an action of *assumpsit* for money had and received. Upon the trial before Lord ELLENBOROUGH, C. J. the *plaintiff* proved that he had purchased a horse of the *defendant* for 30 guineas, which appearing to be unsound, and what is technically called a *roarer* he returned it to the *defendant*. There was no proof of the original warranty, except as follows; when the *plaintiff* applied to the *defendant* to take back the horse, he asked him if he had not sold it as a sound horse, and warranted it to be so. He returned for answer that he had sold him for a sound horse, and he was warranted so to be, and, that,

if he was not, he would return the money. The *counsel for the defendant*, then, objected, that the *plaintiff* could not recover in this form of action, but should have proceeded upon the warranty, or in special assumpsit, upon the promise, proved to have been made as above, at the time when the horse was returned; and they cited *Weston* v. *Downes*,* and contended, that the contract was not at an end, for the *defendant* did not admit that the horse was unsound, which was the subject of the warranty.

Lord ELLENBOROUGH, C. J. Observed that there was this difference between the cases, namely, "that in *Weston* v. *Downes*, there was no promise to return the money if the horse was not sound, and there the action could only be on the warranty for damages." He therefore, overruled the objection, and there was a verdict for the *plaintiff*.

A rule having been obtained, in last *Michaelmas Term* to shew cause why there should not be a nonsuit entered.

GARROW and MARRYAT, for the *plaintiff*, shewed cause. "They cited *Towers* v. *Barrett*† ; which was an action for money had and received, to recover 10 guineas which the plaintiff had paid for a one-horse chaise and harness, under an agreement to pay that sum; but if the *plaintiff's* wife did not approve of it, then to return the chaise and pay 3s. 6d. a day, for the hire of it. It was held there, that, upon the wife not liking the chaise, and its being returned and the sum for hire being tendered, the *plaintiff* was entitled to recover in *assumpsit* for money had and received, as upon a condition which had failed. And Lord *Mansfield* there said, that he approved greatly of the action

* *Dougl.* 23. † 1 *Term Rep.* 133.

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for money had and received, and never permitted the *plaintiff* to be surprized by the very general nature of the count, because, when there were other counts, he would not permit the *plaintiff* to recover, unless the *defendant* had notice of his intent to proceed upon that count also."

LAWRENCE, J. "Here it does not appear to be part of the original contract that the money was to be returned, in case the horse should prove unsound; but in *Towers* v. *Barrett* the original contract was to return the chaise, in case the wife did not like it. There was no warranty in question there, and the *plaintiff* had only to prove that his wife did not like it."

GARROW. "It makes no difference, whether this is to be taken as evidence of the original contract, or, as if after the objection is made to the horse, the *defendant* makes a new agreement. We have only to notify to the *defendant* that we object to the horse, on the ground of its being unsound, and to shew it to be so, and the contract is at an end."

MARRYAT, *on the same side*. "The answer of the *defendant* 'that he did sell him as a sound horse, and that he was warranted so to be, and if he was not so, he would return the money,' must be considered either as evidence of the original contract altogether, or as containing an additional term of a new contract, namely, the promise to return the money. Then if a man makes a new contract, ingrafted upon the former, and unites with it this additional term, he superinduces the second agreement upon the first, and is equally bound by it, as by the original contract, to which it has relation, and he is so bound from the time of the original contract. In the case of *Towers* v. *Barrett* there was as great inconvenience in trying the wife's liking or disliking of the chaise, upon the general count for

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money had and received, as in trying the question of warranty or soundness in this case. The soundness, therefore, is a condition which having failed, the *plaintiff* is entitled to recover as for money had and received."

ERSKINE and LAWES, *contrà*, "A count for money had and received will not lie where there is a disputed question as to the failure of the consideration; *Power* v. *Wells*,* *Towers* v. *Barrett*. They cited also *Heyling* v. *Hastings*,† to shew the necessity of proving the unsoundness of the horse, upon this new promise to return the money; and they contended that the action should have been either upon the first warranty, or else upon the additional and new contract."

Lord ELLENBOROUGH, C. J. "As this is a case which will give the rule in a great many others, it is deserving of much consideration. It may be a question of great importance in actions against stake-holders, where it is necessary to prove the happening of the event or failure of it which is to entitle the *plaintiff* to the money, whether that can be given in evidence upon the count for money had and received; so in insurances where the premium is to be recovered back, on account of the unsea-worthiness of the vessel. In these and many other cases of actions for money had and received, many circumstances of a very special nature were gone into, upon mere actions for money had and received. If this were a question upon the original warranty, there could be no doubt; for, there the *plaintiff* could not recover the precise sum paid, but damages more or less for the injury. The only doubt is, therefore, upon the effect of the latter words of the agreement, where the party says, that, if the horse is not sound, he will return the

* *Cowper*. 818. † 1 *Salk*. 129.

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money; Whether, upon that promise, he does not become a retainer of the money, upon that condition to pay it over, in case the horse is not sound. In *Dutch* v. *Warren*,* though I am by no means inclined to go the length of that case, it was held, upon money paid upon an agreement to transfer stock at a given day, the transfer not being made, the *plaintiff* might recover the amount of the value of the stock at the day, in this form of action, for money had and received, and not merely the money paid. We are desirous of settling this doctrine upon full consideration upon the principles in the decided cases, and still more upon some sound principle which may be referred to both now and hereafter."

Cur. adv. vult.

And, afterwards, the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case "The counsel for the *defendant* at the trial, insisted that there should be a nonsuit, for, according to the case of *Weston* v. *Downes*, it was still in question whether the horse was unsound, the same as it would have been upon an action for the warranty; which question could not be properly tried in an action for money had and received. It occurred to me at the trial, that the promise, that, if the horse was unsound, he would return the money, was a new contract, by which, upon proving the horse to be unsound, the *defendant* was a holder of the money in the nature of a deposit, and then the money would be recovered, upon a count for money had and received, as in the case of stakeholders, upon shewing the failure of the consideration for which it was paid. But, upon further considera-

* *Strange*, 406.

tion, we are of opinion, that it cannot be so considered. There should in that case have been a new promise binding on both parties. But it does not now appear, but that, although there was this second promise, the party might have brought an action upon the warranty. If so, it must be a second promise only concurrent with the first, considering what passed rather as a declaration of the party as to what is originally done, made at a time when if the horse is unsound, he would get nothing for it, and making or proposing new terms, when he excuses himself from the immediate payment of the money, and when the adverse party does not appear to have acceded to it. It therefore stands as upon the original warranty, and the rule for a nonsuit must be

ABSOLUTE.[n]

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MEAGHER *against* MOORE.—28th *Jan.*

Pleading. Slander. Special Damage. Consortium. Vicinorum.

Declaration for words not actionable of themselves, laying as special damage, that certain persons, by name, who used to invite the plaintiff *to their house, and give her meat and drink gratuitously, whereby she saved a large sum, to wit* 100*l. per annum in her necessary expences, afterwards refused to do so.* Semble, *this is upon the face of the record, special damage sufficient to maintain the action, though if it appear to be of a trifling nature, the jury must find a verdict for the* defendant.

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DECLARATION for words spoken of a woman, in effect that she was a harlot, with an averment, that, whereas the said *plaintiff*, before, and at the time of speaking and publishing the false, malicious, and defamatory words herein mentioned, enjoyed the society and conversation, friendship, and countenance, of many worthy and estimable subjects of this realm, to wit, of Sir W. B. Knight, and P. his wife, J. H. and

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Tabitha, his wife, and of C. D. and A. A. and —— his wife, and of divers others, and lived and associated with them on terms of mutual respect, confidence, and intimacy; and was by divers of those persons, to wit, the said Sir W. B., J.H., C. D. and A.A. and others, received and entertained in their respective houses, and found and provided by them respectively with meat and drink, gratuitously, and without any price or sum of money whatever, by her paid or payable for the same, and the great reduction of her necessary expences of living and maintaining herself, and the great increase of her riches, &c.; with a further averment that the *defendant* contriving to impoverish her and deprive her of all the benefit and advantage to her fortune and pecuniary circumstances, so by her received and receivable as aforesaid, &c. and concluding *per quod,* her friends and neighbours and acquaintances, especially the several persons hereinbefore in that behalf named, have wholly refused to hold or permit, any intercourse or society with her, or to receive or admit her into their respective houses or company, or to find or provide for her meat or drink or any other benefits or advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to do, whereby the said *plaintiff* had lost all those benefits and advantages, being to her, theretofore, of great value, to wit, of the annual value of 100l. and has been and is obliged to incur a much greater expence in her necessary living and supporting herself, to a large amount, to wit, to the annual amount of 100l. than she theretofore had done, and otherwise would have done, &c.

To this the *defendant* demurred specially, and the *plaintiff* joined in demurrer.

CURWOOD, in support of the demurrer, was to have argued, that the words not being actionable, except in

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respect of special damage, the damage here laid was not such specific and substantial damage as the court could take cognizance of; but must, from the statement of the declaration, be the loss of a mere gratuitous and eleemosynary invitation to dinner. Having stated this position, and cited *Walker* v. *Bayley*.*

Lord ELLENBOROUGH, C. J. recommended, that he should withdraw his demurrer, and go to the jury, who if that were the case, would find for the *defendant*, but he seemed to intimate, that it might not be so clear upon the face of the record, merely, without such finding.

CURWOOD said, that he advised the party to take issue instead of demurring; and upon consultation, with the SOLICITOR-GENERAL, who was with him, the *defendant* accordingly withdrew his demurrer.

NEWTON *against* CHANTLER.—*January* 28.

A trader in insolvent circumstances, and under arrest in execution, at the suit of a creditor, assigns all his goods and effects to him, in payment of his debt, with a trust for payment of the surplus to himself. Held, this is in contemplation of bankruptcy and fraudulent within the stat. 1 Jac. I. *c.* 15, *s.* 2, *notwithstanding the compulsion of the arrest.*

Bankrupt. Fraudulent assignment. Stat. 4 Jac. I. c. 15, s. 2.

NEWTON *versus* CHANTLER.

THIS was an action of *trover* brought for the recovery of certain household goods and stock in trade, mentioned in the declaration, and late the property of one *George Stelfox*, which action came on to be tried at the assizes for *Chester*, on the 13th day of *September*, 1805, before *Robert Dallas*, Esquire, and *Francis Burton*, Esquire, when a verdict was found for the *plaintiff* for 300l. damages,

* 2 *Bos and P.* 219.

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and 40s. costs, subject to the opinion of this court on the following case. That the said *George Stelfox*, being a malster and trader, became indebted to the *defendant*, a banker at *Northwich*, in the sum of 200l. and to the *plaintiff* in the sum of 690l. for just and true debts, who for recovery thereof, respectively sued, out bailable process against the said *George Stelfox*, in the month of *June*, 1803. That the *defendant*'s writ was first delivered to the sheriff, who thereupon arrested the said *George Stelfox* on the 24th of *June*, 1803. That the said *George Stelfox*, being in custody upon that arrest, in order to procure his release, agreed to give a bill of sale of all his goods and stock in trade to the *defendant* for securing the payment of his debt, who then declared that he should immediately put the same in force. Whereupon a bill of sale on the said 24th day of *June*, 1803, was made and executed to the *defendant*, by the said *George Stelfox*, a copy of which is as follows: 'To all people to whom these presents shall come, I, *George Stelfox*, of *Rudheath* lordship, of the county of *Chester*, malster, send greeting, whereas I am justly and truly indebted unto *Thomas Chantler*, of *Northwich* in the county of *Chester*, gentleman, in the sum of 300l.; now know ye, that I the said *George Stelfox*, for the better and more speedy raising and paying of the said sum of 300l. so due and owing by me as aforesaid, and for and in consideration of the sum of 5s. of lawful *British* money to me in hand paid by the said *Thomas Chantler*, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for divers other good causes and valuable considerations me thereunto moving, I, the said *George Stelfox* have granted, bargained, and sold, and by these presents do fully, freely, and absolutely grant, bargain, and sell, unto the said *Thomas Chantler*, his ex-

ecutors, administrators, and assigns, all and singular my household goods and furniture, malt, stock in trade, and effects whatsoever, now remaining and being in, upon, or about the messuage or dwelling house, malt-kiln and premises, wherein I now inhabit, dwell, use, and occupy, situate, lying, and being in *Rudheath* lordship aforesaid, and all other my goods, chattels, and effects whatsoever, in whose hands, custody, or possession soever the same now are or may be found, and all my estate, right, title, and interest, of, in, and to the same, and every part and parcel thereof; to have and to hold all and singular the said goods, malt, chattels, and effects whatsoever, hereby before granted, bargained, and sold, or intended so to be, to the said *Thomas Chantler*, his executors, administrators, and assigns, as his and their own proper goods, chattels, and effects for ever, to the intent and purpose that he the said *Thomas Chantler*, his executors, and administrators, and assigns, shall and may, by sale and disposal of all or any part of the said goods and premises, levy and raise the said sum of 300l. together with all reasonable costs and charges attending the sale and disposal of the said goods, and chattels, and effects, and render and restore the overplus of the said goods and money, (if any be) unto me the said *George Stelfox*, my executors or administrators; And I, the said *George Stelfox*, do hereby for myself, my executors and administrators, and for every of them, covenant, promise, grant, and agree, to and with the said *Thomas Chantler*, his executors and administrators, that I, the said *George Stelfox*, my executors and administrators, all and singular the said goods, chattels, and effects, unto the said *Thomas Chantler*, his executors, administrators, and assigns, against me the said *George Stelfox*, my executors and administrators, and against all and every other person and persons whomsoever, shall and will warrant and for ever

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defend by these presents, of which goods and chattels I have put the said *Thomas Chantler* in full and peaceable possession, by delivering to him one knife at the sealing and delivering of these presents; in witness whereof, I have hereunto put my hand and seal, the 25th day of *June*, in the year of our Lord 1803. Sealed and delivered by *George Stelfox*, being first duly stamped in the presence of *John Ellison*.—GEORGE STELFOX.' That the *defendant* on the said 24th day of *June*, 1803, and immediately after the execution of the bill of sale, took possession, by virtue of the bill of sale, of the property thereby assigned, being the property mentioned in the declaration, and, without loss of time, caused the same to be sold, and the proceeds of the sale, after satisfying an extent before that time duly issued, at the suit of the crown against the said *George Stelfox*, amounted to 300l. That the said *George Stelfox* at the time of executing the said bill of sale knew that he was in insolvent circumstances, but he had not then committed any act of bankruptcy. That, on the 6th day of *July*, 1803, a commission of bankrupt duly issued against the said *George Stelfox*, on the petition of the *plaintiff*, under which he was declared a bankrupt, the commissioners being of opinion, that the execution of the bill of sale to the *defendant* was an act of bankruptcy, and the *plaintiff* being duly chosen assignee, an assignment was duly executed to him of the personal estate and effects of the bankrupt. The question is, whether the *plaintiff* is intitled to recover? If yea, the verdict to stand; If not, a nonsuit to be entered.

RICHARDSON, *for the plaintiff*, "The question is, whether this bill of sale of all the bankrupt's effects to a particular creditor, for the purpose of paying that particular creditor, and then reserving an ulterior interest, and trust for the bankrupt, is an act of bankruptcy. In *Worseley* v. *De Mattos*,* and the other cases, it is clearly

* 1 *Burr.* 467.

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held that, if the trader is brought to a state in which he must necessarily come to a stop, he is thereby made a bankrupt. When all the effects of a trader are assigned he must become bankrupt, for he can no longer proceed in his trade. And such an assignment is an act of bankruptcy, for this further reason, because it defeats the whole policy of the bankrupt laws, the object of which is to have all the effects of a bankrupt disposed of equitably and equally, by being assigned to trustees appointed by and for the creditors at large; and this object ought not to be defeated by assigning to one creditor, who is a trustee of the trader's own choosing, instead of the assignees, who are trustees chosen by the creditors at large. It is not material in this case, that the *defendant* had arrested the bankrupt previously to the signing of the bill of sale, for the stat. 1 *Jac. I.* c. 15, s. 2, provides, that if any one make, or cause to be made, any fraudulent grant or conveyance of his lands, tenements, goods, or chattels, to the intent, or whereby his, her, or their creditors may be defeated or delayed for the recovery of their just and true debts, he shall be a bankrupt;" and the statute 19 Geo. *III.* c. 22, s. 2, contains no exception to protect deeds made upon such compulsion, but only to protect payments made in the ordinary course of business, and this is not such a payment. In *Cox* v. *Morgan*,* it became a question whether such a payment by compulsion was a payment in the usual course of business, and CHAMBRE, J. differed from the opinion of the rest of the court, and thought that it was not; but the other judges held that a payment by such compulsion was protected. He cited also *Wilson* v. *Day*,† *Alderson* v. *Temple*,‡ *Rust* v. *Cowper*,§ *Law* v. *Skinner*,¶ and also *Butcher*

* 2 *Bos.* and *Pull.* 398. † 2 *Burr.* 827. ‡ 4 *Burr.* 2235.
§ *Cowper*, 629. ¶ 2 *Bl. Rep.* 997.

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v. *Easto*; which latter case he considered as decisively in point."

CLARKE, J. *contrà*. "In all the cases upon the construction of the statute 1 *Jac. I.* c. 15, s. 2, the court has looked at the circumstances of each particular case, to see whether the deed is fraudulent or not. And in *Worseley* v. *De Mattos*, Lord *Mansfield* considers the deed itself as equivocal. He says 'of all the equivocal facts which can amount to acts of bankruptcy, deeds are the most open to be explained by a variety of circumstances. Hardly any deed is fraudulent upon the mere face of it. It is a good sale if the consideration be true; fraudulent if false; good, if possession immediately follows; bad, if it do not.' Here then was a fair and honest consideration; the *defendant's* debt was 300l. and the goods in the bill of sale produced no more; and there was no visible ownership left remaining in the bankrupt by which creditors might be deceived. In *Wilson* v. *Day*, on the contrary, there was no change of possession. In *Butcher* v. *Easto*, the *defendant* had not made the application for his debt previous to the conveyance. It was a voluntary offer on the part of the bankrupt to *Easto*; and he had not used due diligence. Although the bankrupt there was arrested, yet it was not by *Easto*. In *Law* v. *Skinner*,* the conveyance was not accompanied with possession, and in *Compton* v *Bedford*,† there was an assignment of all, a trifle, excepting a man's stock in trade in favour of particular creditors, just before an act of bankruptcy committed, which was therefore fraudulent and void. There must, therefore, be some fact from which fraud can be inferred as from collateral circumstances extrinsic of the mere deed itself, but in this case there is a total absence of all such circumstances."

* *Bl. Rep.* 991. † *Bl. Rep.* 362.

RICHARDSON, *in reply.* "*Stelfox*, the bankrupt knew, at the time, that he was insolvent, which is of itself a collateral circumstance sufficiently indicative of fraud."

LAWRENCE, J. "It is not necessary to look at other circumstances, if the deed itself disables him from carrying on his trade. In *Law* v. *Skinner*, it is reported, that the court said, that that made the bankrupt insolvent, and, therefore was an act of bankruptcy. But a man may be insolvent, and yet not a bankrupt. It is only an act of bankruptcy by conferring all the property on another, and preventing him from carrying on his business, in order to provide for the payment of his debts. But the mere ceasing to trade will not be an act of bankruptcy."

RICHARDSON. "In *Worsley* v. *De Mattos*, Lord *Mansfield* said, that case was clear both upon the deed and upon the circumstances collateral to the deed. *Butcher* v. *Easto*, is not distinguishable from this."

Lord ELLENBOROUGH, C. J. "This is a question arising upon a deed made by a person who had been arrested at the *defendant's* suit, and against whom there was another writ out at the suit of another creditor, he being then in insolvent circumstances, and knowing himself to be so. In this situation, he executed an assignment of all his effects. This has been, in all cases, held to be an act of bankruptcy. If it is not, there should at least be something on the part of him who says it is not an act of bankruptcy, and not fraudulent, to shew that it is not in contemplation of bankruptcy, and to delay creditors. I lay down that every man is to be considered as contemplating the ordinary consequences of every act that he does. He knows, that by such an assignment, he is prevented from carrying on his business; and that operates as an inconvenience on the creditors at large, and delays the payment of their debts. In making this deed,

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he must have been contemplating his probable bankruptcy. In this particular case, he might contemplate an act of bankruptcy, *in invitum*, by laying in gaol two months. If he did not provide for the discharge of the execution he must remain in prison so long. Then must he not contemplate the necessary consequence of his deed? I do not mean that there is an act of bankruptcy visibly and instantly before him; but I must assign this purpose to his act, which is the necessary consequence of it, and must consider that he meant to produce that necessary effect, which operates as an injury to the rest of the creditors. Under these circumstances where he is disabled wholly from trading, I must consider this as a fraudulent deed, within this statute."

GROSE, J. "Generally speaking, an assignment of *all* is an act of bankruptcy, and this case is not distinguishable from others."

LAWRENCE, J. "If the necessary consequence of this deed was to prevent the goods from going to all the creditors, and to cause them to go to a partial creditor in opposition to the course of the bankrupt laws, that is, notwithstanding the circumstance of the compulsion of the arrest, an act of bankruptcy."

LE BLANC, J. "In cases like this, it has been held, that a conveyance of all the goods of a bankrupt, to a particular creditor, is an act of bankruptcy, and it makes no difference that the person taking the assignment made an arrest. I cannot distinguish this case from *Butcher* v. *Easto*, where a man executed a deed to a creditor who came forward to relieve that debtor from the arrest of another person; and that is, therefore, a clear authority, that the circumstance of compulsion by arrest shall not take this out of the general rule."

JUDGMENT for the PLAINTIFF.

SCHOLEY and Another *against* PAGE.—*Jan.* 31. 1806.

Bail-bond. Pleading. Satisfaction.

To debt on a bail-bond, at the suit of the sheriff, the defendant *pleaded that the action was brought for the benefit of one* S. *a bailiff to the* plaintiff, *and that, on the arrest,* he *paid* 22*l. on account of debt and costs to* S. *for the* plaintiff *in the suit, and also* 5*l. further, in satisfaction, before the rule on the sheriff expired, and which would have satisfied the debt and costs, and was by* S. *accepted in satisfaction; held bad, on demurrer, for* S. *had no legal interest in the bond, and no power even to release by deed, and satisfaction without deed is no plea, and it ought to have been the ground of an application to the equitable jurisdiction of the court, if available at all.*

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THE *plaintiffs* declared in debt, upon a bail-bond made to them as sheriff of *Middlesex*. The *defendant* craved oyer of the bond and condition, which was for the appearance of one *W. Mearns*, at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer to *George Loveday*, &c. and also to a bill of the said *George* for 50*l.* &c. and the *defendant* says, *actio: non*, because the action is brought and prosecuted by the *plaintiffs*, for the use and benefit of one *James Simpson*, and as trustee for him and not for their own use; and further, that before the making of the obligation, the said *W. Mearns*, to wit, on, &c. at, &c. was arrested by the said *James Simpson*, then being one of the bailiffs of the *plaintiff*, as sheriff of, &c. under a certain precept of our lord the now king, and called, A Bill of *Middlesex*, &c. at the suit of the said *George Loveday*, against him the said *W. Mearns*, and returnable in the said court, on *Wednesday* after 15 days of *Easter* then next following, and now past, &c. and which was indorsed for bail for 20*l.* by virtue of an affidavit, &c. and under and by virtue of a certain warrant under the hand and seal of the said sheriff, &c. And the said *W. Mearns* having been so arrested by the said *James Simpson*, as such bailiff of the said she-

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riff of *Middlesex*, he the said *W. Mearns* did afterwards and before the return of the said precept, to wit, on the 20th day of *March*, in the year aforesaid, at, &c. pay to the said *James Simpson* a large sum of money, to wit, the sum of 22l. for and on account of the debt and costs in the said action, so commenced by the said *G. Loveday* against the said *W. Mearns*, and of the fees and expences attending the said arrest, giving the said bail-bond and other charges; and that, afterwards, and before the return of any rule of the said court of our said lord the king, before the king himself, upon, or commanding the said sheriff to return the said writ, and long before the commencement of this suit, to wit, on the 2d day of *May*, in the year aforesaid, he the said *W. Mearns* did pay to the said *James Simpson*, as such officer as aforesaid, the further sum of 5l. for and on account of the debt and costs in the said action so commenced by the said *G. Loveday* against him the said *W. Mearns*, the fees, expences, and charges, of and attending the said arrest, and giving the said bond and damages sustained by reason of any proceedings then taken by virtue thereof, or of or upon the said precept, making in the whole the sum of 27l. which sum of money was, then, and there at the time the same were so paid as last aforesaid, fully sufficient to pay and satisfy to the said *G. Loveday*, the *plaintiff* in the suit aforesaid, the debt and costs in the said action so commenced by him against the said *W. Mearns* as aforesaid, and the fees, costs, and expences, of and attending the said arrest, giving the said bail-bond and all proceedings had thereon, or of or upon the said precept: and which sum of 27l. so paid in manner aforesaid, the said *James Simpson* then and there accepted of and from the said *W. Mearns*, in full satisfaction and discharge of the said writing obligatory and condition thereof, and of all damages and cause of action in respect

thereof; and he further says, that if any damage or expence has accrued by reason of him the said *Wm. Mearns* not appearing in the said court of our said lord the king, according to the condition of the said writing obligatory, and the exigency of the said precept, subsequent to the payment of the said 27l., the same was occasioned by the default of the said *James Simpson*, in not paying over to the said *plaintiff* in the said action, or his attorney, the amount of the debt and costs which would have been taken and accepted by the said *plaintiffs*, or his said attorney, and sufficient to pay which, over and besides such fees, expences, and charges as aforesaid, had been so paid by the said *W. Mearns* to the said *James Simpson*. The *plaintiffs* demurred and shewed for cause that no competent discharge by the said *plaintiffs* or either of the said writing obligatory, or the condition thereof, or any legal satisfaction thereof, to them or either of them, is stated on the said plea; and it is not shewn at what time or place, or under what circumstances, the said *plaintiffs* became or were trustees for the said *James Simpson*; or when, where, or in what manner, the said *James Simpson*, became entitled to any benefit or advantage of or from such writing obligatory; and it is not alledged, that the said *James Simpson* had any beneficial or other interest in the said writing obligatory at the time of his acceptance of the money by the said plea supposed to have been paid to him in satisfaction and discharge thereof; and for that, if the said *James Simpson* were at that time interested in the said writing obligatory, no sufficient discharge thereof by him, or satisfaction of the same to him, in point of law, is shewn by the same plea.

Joinder in demurrer.

MARRYAT, *in support of the demurrer*; "Where there is any duty to be performed arising upon a deed,

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for any act to be done, except the payment of money, accord can only be by deed, and there can be no satisfaction pleaded, but by deed; *Peto's* case.* So, where there was debt brought on a bond, the *defendant* pleaded an indorsement of a condition to render an account before a certain day, and, that, before that day he paid so much money in satisfaction; it was held upon demurrer that no payment of money in satisfaction can be pleaded † So here, there is an attempt to raise a question of fact upon the record by way of plea, which ought to be the foundation of an application to the equitable jurisdiction of the court. In *Donnelly* v. *Dunn*,‡ to an action brought upon a recognizance of bail, the *defendant* pleaded the bankruptcy of the *defendant* in the original action; and it was held bad on demurrer. And it was said that it was of importance to the profession to put an end to defences being stated upon the record, which might more properly be applied to the equitable jurisdiction of the court: and yet, there it was clear that the *defendant* might have been relieved, upon the facts there stated, upon motion; *Preston* v. *Christmas*."§

LE BLANC, J. "Your argument goes to shew, that even if the money had been paid to the *plaintiff* in the action, it would not have been a good plea to this action.

But, secondly, admitting that if the satisfaction pleaded, would be a good bar, before the breach of the condition of the bond, yet it cannot be pleaded after; and, here the whole sum was not paid till after the breach of the condition, by two payments of 22*l.* and 5*l.* At common law the payment of money in a condition to a bond could not be pleaded; and it was necessary to pass a statute for the express purpose of allowing it."

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* 9 *Co. Rep.* 78. † *Dyer. Rep.* 1. ‡ 2 *Bos. and Pul.* 45. § 2 *Wilson*, 86.

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LAWRENCE, J. "That applies only to the payment of a less sum than the bond; at all times, the payment of the penalty might be pleaded.

In this case the sum is less than the penalty. Where there was an agreement, instead of paying *plaintiff* on a certain day, to give the obligee a horse, and 20l. it was held, that it was not a good satisfaction although the delivery was on the day in pursuance of the agreement made before the day. Thirdly, this is pleaded not as accord and satisfaction nor as an agreement in satisfaction; and it is not shown that *Simpson* had any interest in the bond for the *plaintiff* or otherwise; for the plea is only, that at the time of the action brought, the action is brought for the benefit of *Simpson*. And it does not even appear that he had any interest in the bond at the time of the payment, when, if it ever was a satisfaction, it was so then. *Simpson* therefore, to whom the satisfaction is made, could not even have released the bond, and therefore could not take satisfaction for it. 'Debt on a single bill made to A. to the uses of him and B. the *defendant* pleads a release made to him by B., on which the *plaintiff* demurs; and without difficulty; it was adjudged for the *plaintiff*. For B. is no party to the deed; and therefore, can neither sue, nor release it; but it is an equitable trust for him, and suable in *Chancery*, if A. will not let him have part of money, and the book of E. IV. cited that he might in such case, release, denied to be law."* He cited also 2 *Institutes*, 673.

ESPINASSE, *contrà*, cited *Winch* v. *Keeley*,† and *Bottomley* v. *Brooke*,‡ and contended that the bailiff *Simpson*, was in effect the sheriff, and that the court would take notice of the trust and of the real interest of the parties.

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* *Offley* v. *Ward*, 1 *Lev.* 235. † 1 *Term Rep.* 619.
‡ 1 *Term. Rep.* 621.

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Lord ELLENBOROUGH, C. J. "If the bailiff and the sheriff are one person, then ought not this to have been pleaded as payment to the sheriff. As to this bond, if the court would take notice of such trusts, then the statute which makes bail-bonds assignable, would be nearly useless. If this plea were allowed, there would be an end of the simplicity of the common law, and of the distinction between the two courts of equity and of common law, and it would make all bonds completely assignable."

LAWRENCE, J. "In the case of *Winch* v. *Keeley*, it was contended that the *plaintiff* having been a bankrupt, the bond passed to his assignees, but it was shewn that he was only a trustee for *another*, and it was contended, therefore, that it did not pass under the commission, but the action was brought, not by a trustee merely, but by the original obligee, and can have little bearing upon this case."

Lord ELLENBOROUGH, C. J. upon *Espinasse* citing *Webster* v. *Scales*, cited in *Winch* v. *Keeley*; "There the bond was taken in trust for the persons who were the parties to the suit."

MARRYAT, stated that in the court of *Exchequer* lately, in the case of *Lane* v. *Chandler*, the court had, as he was informed, overruled the case of *Bottomley* and *Brooke*, and *Winch* v. *Keeley*.*

LE BLANC, J. "If the cases of *Bottomley* v. *Brooke* and *Webster* v. *Scales*, had never been impeached, this plea could not have been good; for this goes wholly beside that case."

LAWRENCE, J. "In the case cited in the Common Pleas, during the argument,† BULLER, J. reprobated the

* It seems he was misinformed in this. See 3 *Smith's Rep. p. 77.*

† *Vide supra.*

practice of putting upon the record matter which ought to be applied to the equitable jurisdiction of the court."

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JUDGMENT for the PLAINTIFF.

The KING *against* the Inhabitants of MERSHAM.

Feb. 1st.

A master of a workhouse appointed in vestry, has not a public office or charge under 3 *and* 4 *W. III. c.* 11, *s.* 6, *to gain a settlement. A public office and charge are the same thing. Such charge or office must be such as must necessarily be filled in succession, not a mere duty, upon a contract, which may be suspended or continued at pleasure.* Semble, *the test of an office or charge, is that it imposes a duty for the neglect or breach whereof the party may be indicted.*

Poor settlement. Stat. 3 and 4 W. III. c. 11. s. 6. Public office a charge. Master of a workhouse.

APPEAL to the quarter-sessions for *East Kent*, from an order of two justices, for the removal of *Richard Wraith*, his wife and children from *Boxley* to *Mersham*, both in the same county; whereupon the said court confirmed the order, subject to the opinion of this court upon the following case: Previous to the year 1800, the pauper's settlement was at *Mersham*; sometime in that year, being informed that a master of the work-house in the parish of *Boxley* was wanted, he applied for that appointment, and was desired to send in his proposals, and a certificate of his character to the weekly vestry of the parish; he attended at such vestry, and, after some questions and inquiries, he was desired to retire, that his proposals might be considered. Shortly afterwards he was informed that his proposals were accepted and his character approved of, and he was desired to attend a subsequent vestry to receive his appointment. He attended accordingly, but, there being but a very small attendance of the inhabitants at

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that vestry, his appointment was postponed to a vestry holden on the following *Sunday*, when he attended, and, there being twelve of the inhabitants present, he was informed by the parish officers that he was appointed master of the workhouse of the parish of *Boxley*, at a salary of 16*l.* per annum. Nothing was said, either at the time of his appointment, or afterwards, as to the time for which he was to hold his situation; but the pauper conceived he might at any time be dismissed at a quarter's notice. There was no appointment in writing, nor any entry in the parish books. He continued master of the workhouse and resided in the parish of *Boxley* four years, and during the fifth year was dismissed at a quarter's notice. The duties performed by the pauper were the superintending and managing the poor in the workhouse, teaching the poor children to spin, weaving himself, and carrying on the manufacture. He carried the accounts quarterly to the overseers. The sessions were of opinion that the pauper did not gain a settlement in the parish of *Boxley* in consequence of the appointment and service above mentioned.

TADDY, *for the appellants.* "Such office as mentioned in the statute must mean either an office at common law or one created by statute. The king cannot create a new office. Offices must either be by law or custom, and offices cannot be changed. If the king grant an office, by the name of an office, with the fees, and it appears that it is new, the grant is void. Most of the ancient offices belonging to a parish have an appointment by the leet, and they hold for the performance of the office; but this arises out of a mere contract. In the *King* v. *the Inhabitants of Ilminster*,* where a pauper was appointed governor of the

* 1 *East*, 83.

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workhouse in the parish at an annual salary, and it was stated in the case that it was a public annual office; the court held, that that circumstance precluded all discussion; and *Bicham's case** was cited to shew that it was only material to prove that it was an office of a public nature."

Lord ELLENBOROUGH, C. J. "What is the test of a public office. Is it not, that the officer may be indicted for negligence or breach of duty."

PITCAIRNE, *contrà*. "The appointment in this case, was by the parish in vestry; for it appears that he was desired to give in his terms to the vestry, and was not appointed, until there was a sufficient number of persons present to authorise the appointment. It was also an appointment at a yearly salary, and as nothing was said at the time as to the duration of the office, it must be taken to be an annual office. What is stated as to the apprehension of the pauper, will make no difference in the legal effect of the contract or appointment. The words of the statute 3 and 4 *W. III.* c. 11, s. 6, are 'if any person, who shall come to inhabit in any parish shall for himself execute any public annual office or charge in the said parish during one year, then he shall be adjudged to have a legal settlement.' It is, therefore, not necessary to shew that it is an office; it is sufficient if it be a public charge."

Lord ELLENBOROUGH, C. J. "What is the difference between a public office and a charge? It seems to me, that they are synonymous terms. Having the charge of the workhouse would just as well shew that he was a public officer, by shewing that he has a charge which extends over all the poor. You cannot find any case of a public charge, as distinguished from a public office."

* 1 *Strange*, 414.

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PITCAIRNE. "The 6th section of the statute was an exception from the general law, which required notice of the paupers' coming to live in the parish; and it was so made an exception, on account of the notoriety; and it has been held, that it is a statute which ought to be construed liberally, being an enabling statute. And it has also been held that it does not extend merely to parish offices: and this is of all others an office rendered most notorious, by the election to it being made by the whole parish in vestry."

Lord ELLENBOROUGH, C. J. "The argument upon the special notice introduced by the statute 3 and 4 *W. III.* c. 11, brings it to the principle from which we set out; whether the holding this place constitutes an office within the statute, that is to say, whether it is a public office of notoriety? The case which was lately decided of a curate was certainly an office of as much public notoriety as can well be found. It appears to me, however, in this case, that there is nothing like a public office. An office must be at common law, or by authority, either from the crown, or constituted by act of parliament. This is neither; it is merely an employment arising out of a contract with the parish. If this were a public office, any person that performs any special services for the parish may be a public officer. If there was any distinction between a public office and a public charge, there might be some difficulty; but I can see no difference; a public charge is something of a public nature, imposed in virtue of an office. Besides, is this an annual office? It does not appear to be so. As far as from the nature of the contract, there being no time specifically mentioned, it may continue for a year, and may be construed an annual agreement; but even that is explained by the party himself, who determines the contract."

GROSE, J. Was absent from indisposition.

LAWRENCE, J. "If the pauper has gained a

settlement, it is in consequence of that which is rendered equivalent to notice, by the stat. 3 and 4 *W. III.* c. 11, s. 6. He must, therefore, make out that which the statute has required, and we cannot construe any thing to be that which in reality it is not, because it appears to be an equivalent for that which the statute intended; and it will not entitle the pauper to a settlement, unless it is an office. The question, therefore, is simply, whether this is an office or not? In the *King* v. *Melborne*,* it was held that a school-master of a charity school was not an officer, although his situation was very notorious. As to the word *public charge*, unless that is confined to an office, it would be going a great way indeed; for suppose a man were to contract annually to keep the parish church in repair, that might be considered a public charge."

LE BLANC, J. "This man is not within the statute 3 and 4 *W. III.* c. 11, s. 6, unless we can consider that a person who has any duty to be performed, whether it has any thing to do with an office or not, has a public office or charge. The pauper is a person who executes a duty between the overseers of the parish and the public, upon a contract made with them. Now, I consider that only to be an office, which must necessarily be exercised by some one to be appointed to it in succession. But this is only a duty to be performed on a contract. The overseers have properly the care of the poor, and they employ this person to do that duty personally for them. They might have appointed him themselves. They only apply to the vestry, in consequence of its being necessary to have the funds appointed by them for the payment of his salary. But those who employed him might have dispensed with his services, and might have ceased to employ him, had it not been for the terms of their

* 1 *Wils.* 87. *Burr.* S. C. 244.

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contract, when they pleased, and thus they might have chosen whether they would or would not employ or appoint any person to fill his place, or rather to execute the same duties.

ORDER QUASHED.

HOVIL and others, assignees of WARDELL (a bankrupt) *against* JOSEPH BROWNING.—*January* 31st.

Stat. 19 Geo. II. c. 32, s. 1. Bankrupt and Creditor. Foreign attachment. Payment in course of trade.

Where money belonging to a bankrupt was, after a secret act of bankruptcy, attached in the hands of a garnishee, *by the custom of foreign attachments in* London, *and paid over by him; held, that such receipt of money was not protected by stat.* 19 *Geo. II. c.* 32, *s.* 1, *as a receipt of money under compulsion of law: for that statute extends only to payments by the bankrupt himself in the ordinary course of trade, and not to payments by other persons unauthorised by him; and, therefore, the assignees recovered of the person receiving such money, under the foreign attachment, as for money had and received to the use of the bankrupt.*

HOVIL and Others *versus* BROWNING.

THIS was an action of *assumpsit* for money had and received by the *defendant* for the use of the *plaintiffs*, as assignees of *Wardell*, a bankrupt. The *defendant* pleaded the *general issue*, and at the trial before Lord ELLENBOROUGH, C. J. at the sittings at *Guildhall*, after last *Trinity Term*, a verdict was found for the *plaintiffs* for 367*l.* 16*s.* 6*d.* subject to the opinion of the court upon the following case. In *November*, 1802, *Wardell* being a trader, became indebted to the *defendant* in 367*l.* for goods sold and delivered, and on the 27th *January*, 1803, set sail in a ship of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. In the month of *July*, 1803, insurances to the amount of 3,400*l.* on the ship and cargo, were effected for the bankrupt by *M. de Beaune*, a po-

lity-broker, residing in the city of *London*; and, in the said month of *July*, 1803, the ship and cargo were captured by the *French*. On the 20th *January*, 1804, the *defendant* brought an action in the Mayor's court of *London* against the bankrupt; and attached the sum of 367l. in monies numbered in the hands of *De Beaume*, who had received the amount of the policies of insurance from the underwriters, and the *defendant* having on the 28th of the same month obtained a regular judgment by default in that action, received the sum of 367l. from *De Beaume*. The bankrupt returned to *England* in *February*, 1804, and on the 9th of *March* following, a commission of bankruptcy was issued against him, under which the *plaintiffs* were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the *plaintiffs* as such assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the *defendant*. *Wardell* had been a bankrupt twice before; viz. once in the year 1786, and again in the year 1788, and had obtained his certificate under those commissions; but had not paid a dividend of 15s. in the pound, under the last of them, and his creditors at that time still remain unsatisfied. Question, whether the *plaintiffs* are entitled to recover?

SEDGWICK, for the *plaintiffs*, stated that the question, in this case turned upon, whether the judgment under the foreign attachment authorised the payment to the *defendant*, under the exception contained in the stat. 19 *Geo. II.* c. 32, s. 1, to protect payments made in the course of trade; and he cited *Bradley and others assignees of Bradley* v. *Clark*,* *Copland and others* v. *Stein*†. The circumstance of proceeding at law, against the

* 8 *Term Rep.* 199. † 8 *Term Reports*, 199.

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bankrupt proves that the party knew him to be in insolvent circumstances. By the process of the foreign attachment, a debt due to the original *defendant*, from the garnishee, is attached in his hands, and the statute does not protect the payment of any debt, by compulsion of law, by another person, but only the payment of money in the usual course of trade. He cited *Vernon* v. *Hall*.* *Hunter* v. *Potts*,† and *Sill* v. *Worswick*.‡

Le Blanc, J. "They were both cases of creditors, who were cognizant of the bankruptcy.

The distinction between money paid after the act of bankruptcy, and before the assignment does not prevail in this case; and it is wholly immaterial whether the money was received after the commission, although that was a circumstance relied upon in some of the cases; for the statute applies to the time of the act of bankruptcy, and the property vests in the assignees from the bankruptcy. It was also objected at the trial, that *Wardell* having been a bankrupt twice, and not having paid 15s. in the pound on the last commission, he could not be a bankrupt a third time, because his future effects are liable to the creditors under the second commission; but after the certificate is allowed, the assignees have no further claim upon the property whatsoever. The goods remain the effects of the debtor, subject to the unsatisfied claims of the residue of the creditors, under the second commission, and if this claim should not be enforced the property is in him."

Le Blanc, J. "The ground is that the assignees

* 2 *Term Rep.* 648. † 4 *Term Rep.* 182.
‡ 1 *H. Black.* 694.

under the last commission can have no right because those of the second commission have."

Sedgwick, "When the statute makes the bankrupt liable to his creditors, it leaves him in the common case of a debtor, with respect to his creditors. Besides here is an interval of fifteen years between the two commissions, and the creditors may be barred by the statute of limitations."

Jervis, *contrà*. "The question is, whether the payment is protected as a payment in the usual course of trade under the statute 19 *Geo. II.* c. 32, s. 1. That statute recites the inconvenience of secret acts of bankruptcy, and enacts 'that no person who is really and *bona fide*, a creditor of any bankrupt for or in respect of goods, really and *bona fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange really and *bona fide* drawn, negociated, or accepted by any such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund or repay, to the assignees of such bankrupt's estate any money which before the suing forth of such commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person, of any such bankrupt before such time as the person receiving the same shall know, understand or have notice that he is become a bankrupt, or that he is insolvent in circumstances.' Before this statute, it was the policy of the law to deprive the bankrupt of the power of disposing of his effects, after the act of bankruptcy. It is a remedial statute, and the words are '*bona fide*, and in the usual and ordinary course of trade received by such person before such time as he shall know, understand, or have notice that he is become a bankrupt or in insolvent circumstances:' now it is stated, that *Wardell* committed a secret act of bankruptcy, and this act of bankruptcy

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was, therefore, unknown at the time, when the *defendant* instituted the action against *Wardell,* and attached the money in the hands of *De Beaume,* under which attachment the money was paid. It was the object of the statute to protect payments made *bona fide;* and there is no better criterion of the *good faith* of the transaction, than the payment by compulsion of a suit at law. *Calvert and others assignees of Jones* v. *Lingard.** There a creditor of the bankrupt brought a sheriff's officer, with a writ into the shop, and then the debt was paid, and it was held good. In the case of *Cox* v. *Morgan,*† there was indeed a difference of opinion between the judges, but in *Holmes* v. *Wennington,*‡ the same principle is adopted, and both of these cases were cited in *Bradley* v. *Clark,* and no doubt was hinted as to their propriety. In *Cox* v. *Morgan,* Mr. JUSTICE HEATH says, that if the objection is made to the payment, because it is made under an arrest, and that is to be made the ground of the decision against the creditor, it will introduce great uncertainty, for if an arrest is to vitiate the payment, why not a menace; and if a menace, why not the promise of some collateral benefit. Now, if the payment under an arrest is good, the payment under a judgment is good; for, otherwise, he who arrests, would lose all benefit by proceeding to execution, which is the fruit and natural consequence of arrest and judgment. By the statute 21 *Jac.* I. c. 19, s. 9, persons having security for their debts by judgments, or having made attachments in *London* of the goods of any such bankrupt, whereof there is no execution or extent served and exe-

* Cited 5 *T. Rep.* 200, *H. Blac.* 335. In *Cox.* v. *Morgan,* it is said, this case was heard on a motion for a new trial in the Common Pleas.

† 2 *Bos.* and *Pull.* 395.

‡ 2 *Bos.* and *Pull.* 399. (*n*).

cuted upon any of the lands, &c. before such time as he shall become bankrupt shall not be relieved upon such judgment for any more than a rateable part with the other creditors. The cases cited do not apply, for *Bradley* v. *Clark* is a case of payment to a *carrier*, and the statute is in favour of debts for goods sold and delivered, bills, &c. Then, as to the words in the ordinary course of trade; *Copland* v. *Stein*, is on the same footing, the payment not being protected by the express words of the statute. So *Vernon* v. *Hall*, was not a payment in the usual and ordinary course of trade; but a payment on a loan; there being time given in that case. In *Hunter* v. *Potts*, and *Sill* v. *Worswick*, the party had notice of the bankruptcy."

Lord Ellenborough, C. J. "How do you read the words '*in the usual and ordinary course of trade*?"

Jervis. "There is nothing unusual in a trader's being sued."

Lord Ellenborough, C. J. "But is it not the object of the act to protect inadvertent acts of payment by the bankrupt to his creditors? There are many qualifications; it must be in the ordinary course of trade, and it must also be without notice of the bankruptcy; and the statute has been very strictly construed in the case of the carrier."

Jervis. "It is very usual for creditors to go to a bankrupt and demand their money, and threaten him with a process of law, and if the threat of process will not avoid the payment, so neither ought the suing of process. After the judgment in *Cox* v. *Morgan*, it is not necessary to trouble the court with much argument on this part of the case. It has been argued for the *plaintiffs*, that it is not material whether the payment

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is after the assignment, under the commission or not; because the act of parliament vests the property in the assignees from the bankruptcy; but the commission would at least be notice of the bankruptcy, under the act; because it is inserted in the gazette."

Lord Ellenborough, C. J. "The creditor is not bound to take notice, that he is a bankrupt: he is bound to take notice of the act of parliament; but not of the commission under it. It is a question entirely for the jury; but they may presume that he knew it by the publication in the gazette."

Jervis. "In *Neale* v. *Cottingham*,* there was no notice; but in that case the commission was sued out and the assignment made previously to the attachment, and the ground of the decision was, that the commission was sued out before the attachment. He noticed the cases of *Solomons* v. *Ross*,† and *Joliffe* v. *De Ponthieu*,‡ which are all cited in *Sill* v. *Worswick*." On the other points he did not think it necessary to adduce any arguments.

Sedgwick, *in reply*. "Here is no personal application to the bankrupt, and as to the case of a mere menace vitiating the payment, it cannot occur where there is an attachment: for that is merely the attaching of the money in the hands of a third person, and that money may be attached without the knowledge of the bankrupt himself. And, if such a payment were allowed, a person having money of the bankrupt's in his hands might permit judgment to go by default, in the inferior court, where the proceedings are very expeditious and the bankrupt be stripped of all his property."

Lord Ellenborough, C. J. "If it were neces-

* 1 *H. Blac.* (*n.*) 132. † 4 *Term Rep.* (*n.*) 188.
‡ 1 *H. Bl.* (*n.*) 131.

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sary now to decide the question upon which the court of *Common Pleas* differed in opinion, in the case of *Cox* v. *Morgan*, from the great deference which I should pay to the learned judges who presided there, I should have been anxious not to have decided upon that case without the most mature deliberation, considering that the judgment of the majority is fortified by authorities, and the actual practice of legal courts, though I should have inclined in favour of the opinion of the single judge, Mr. Justice *Chambre*. But it is not at all necessary to consider, here, whether the case of *Cox* v. *Morgan* is rightly decided. The present case is one which is to be brought within the limitations of an act of parliament, under which alone the payment is to be protected. By that act it must be a payment by the party, the bankrupt himself. He must be conscious of the act, which is to be his own act, or if not, it must be under some general authority for the express purpose of making ordinary payments. But can a proceeding against another person, and of which he, the bankrupt, is not conscious at the time, be a payment in the ordinary course of trade. Indeed I think it cannot be a payment by the bankrupt at all, unless we can recur to the compulsion of law and suppose that he has authorized every thing which the law compels to be done."

LAWRENCE, J. "This is not a payment by the bankrupt, but a payment by compulsion of process, of a sum which the bankrupt might not even know was in the hands of the person in whose hands it was attached; for the loss happened, upon which the money was received, after the bankrupt was out of the country."

LE BLANC, J. "This is a very different case from

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that of a payment under an arrest, and the words of the statute are applicable to the protection only of payments received from the debtor, and we cannot extend the limitations of the act to payments received without the bankrupt's knowledge and without his even knowing that the garnishee had the money in his hands at the time."

JUDGMENT for the PLAINTIFFS.

HOVIL and others assignees of WARDELL, a bankrupt, *against* PACK and another.

Bankruptcy. Policy of insurance. Agent. Money had and received.

A. commits an act of bankruptcy, and quits England, having, previous to his act of bankruptcy, become indebted, as indorser of a bill of exchange, to B. which bill is dishonoured and due notice thereof given. In A.'s absence, his wife makes insurances, the broker being still a creditor for the premiums paid by him. B. having sued the drawer and obtained judgment, is induced by A.'s wife to take a bill in part payment indorsed by her for A. and stay execution, upon depositing the policies; which being done, a loss happens. This bill not being paid, B. the broker, accepts another for the amount, in his favour, upon the policies being delivered to him for A., with the consent of A.'s wife, and having received the money thereon, pays that bill, and deducts in account with A.'s assignees, against whom a commission is issued after such payment: Held, that the assignees could not recover of B.: for A.'s wife, and the broker, were their agents, and they could not take the benefit of the policies, effected by her, without taking the burthen.

HOVIL and Others *versus* PACK and Another.

THIS was an action of *assumpsit*, for money had and received by the *defendant*, for the use of the *plaintiffs*, as assignees of *Wardell*, a bankrupt. The *defendants* pleaded the general issue, and at the trial before Lord ELLENBOROUGH, C. J. at the sittings at *Guildhall*, after last *Trinity* term, a verdict was found for the *plaintiffs* for 230*l*., subject to the opinion of the court on the following case:

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In *November*, 1802, *Wardell*, being a trader, indorsed a bill of exchange, which would become due on the 8th of *February*, 1803, and which in the month of *December*, 1802, was indorsed over to the *defendant*, for a valuable consideration. On the 27th *January*, 1803, *Wardell* set sail in a ship of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. The bill was refused payment when due, and notice thereof given to the proper parties. In the month of *July*, 1803, the bankrupt's wife caused insurances to the amount of 3,400*l*. on the ship and cargo, to be effected for the bankrupt by Mr. *De Beaume*, a policy broker, residing in the city of *London*, and who delivered them to Mrs. *Wardell*, without being paid the premiums. Mrs. *Wardell*, soon afterwards applied to the *defendants*, whose debt was still unpaid, and who had brought an action against the drawer of the bill above mentioned, and obtained judgment by confession in such action, to take another bill for part of the amount of the first, which she indorsed as attorney for her husband, and stay execution, until such second bill should become due; and, as an inducement to them to do so, offered to deposit the policies with them, as a security for the payment of such second bill. This the *defendants* agreed to, and the policies were accordingly deposited with the *defendants*. In *July*, 1803, the ship and cargo were captured by the *French*. On receiving intelligence of the capture, Mrs. *Wardell* applied to the *defendants* to deliver up the policies, for the purpose of receiving the amount of the subscription, which they refusing to do, without security for payment of their debt, (the second bill having been also dishonoured) *De Beaume*, at her request, accepted a bill of exchange at one month for 230*l*., the amount of the *defendants'* debt, and the policies upon this, were at the request of Mrs. *Wardell* delivered up to him.

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This bill was regularly paid, when due, by Mr. *De Beaume*, who had received the amount of the policies of insurance from the underwriters. The bankrupt returned to *England* in *February*, 1804, and, on the 9th of *March* following, a commission of bankrupt was issued against him, under which the *plaintiffs* were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the *plaintiffs*, as assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the *defendants*. *Wardell* had been a bankrupt twice before, viz. once in the year 1788, and had obtained his certificate, under each of those commissions; but had not paid a dividend of 15s. in the pound under the last, and his creditors at that time still remain unsatisfied. *Question*, Whether the *plaintiffs* are entitled to recover?

After the judgment in the former case, without argument.

Lord Ellenborough, C. J. "Here you get the policies out of the hands of the *defendant*, with whom they were pledged for the purpose of getting payment upon them, upon the faith of a bill drawn by *De Beaume*. After that he receives the money on the policies, and pays his own bill. He is the agent of the assignees for one purpose, and they must consider him as such throughout. This action is not indeed, brought against the insurance broker, but, against the person who receives the money of him. This man is appointed originally by the wife; and, if you admit the act of *De Beaume*, under the directions of the wife, you must admit altogether; if you take the benefit of the agency, you must take it *cum onere* also. He is the last receiver of the money, paid over originally wrong. The facts are simply these. *Pack* having a demand on the bankrupt, the wife procured

him to give up a bill of exchange, and take another, she depositing these policies. This second bill not being paid, he refuses to give up the policies to the broker, unless he gives another bill, and the broker out of that money, pays the bill."

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JUDGMENT for the DEFENDANT.

LADY WILSON *against* Sir FRANCIS WILLES, Knt.

Jan. 24.

Several customs pleaded for all tenants of a manor, their farmers and occupiers of tenements of the manor, having gardens, to take soil covered with grass, on a common, for making and repairing grass plots in gardens for the improvement thereof; and for the improvement of the gardens; and further, for the making and repairing of banks and mounds for the hedges and fences of tenements belonging to the manor; and further, for the improvement of such tenements, not saying agricultural improvement; held, each, to be too large and uncertain, and to be destructive of the right of common, and therefore bad.

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THE *plaintiff* declared in trespass, *quare clausum fregit*, on *Hampstead Heath*, in *Middlesex*, for digging up certain turf of the said *plaintiff* there being, covered with grass, fit for the pasture of cattle, &c.

The *defendant* peaded the general issue, as to the force and arms, &c. and as to the residue *actio. non* because the said close in which, &c. is, and at the said time, &c. was, and from time immemorial hath been, a certain large waste, situate within and parcel of the manor of *Hampstead*, within which there are and have been, &c. divers customary tenements demised and demiseable, &c. and that there now is, and from time immemorial hath been, a certain ancient and laudable custom, that all and every the customary tenants for the time being, of all and every the aforesaid customary tenements, parcel of the

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said manor, having a garden or gardens, part of the same respectively, from time whereof, &c. have dug, taken, and carried away, and have been used to dig, &c. in upon and from the said close, in which, &c. by themselves and their farmers and tenants, respectively, occupiers of such customary tenements, with the appurtenances respectively for the time being, and by and with their servants, cattle, and carriages to be used and spent in and upon their said customary tenements respectively, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times in the year, and as often, and in such quantity as occasion hath required, as to their said customary tenements, with the appurtenances respectively belonging. The plea then set out a demise by copy of court roll by a former lord of the said manor of a certain tenement and garden, and certain pieces or parcels of ground with the appurtenances, in and parcel of the said manor, to the *defendant*, in fee, and that the *defendant* was thereby seised in fee, at the will of lord, &c. and being so seised, the *defendant*, at the said times when, &c. being times when occasion required, entered into the *locus in quo* and dug, and took away the said turf in the declaration mentioned, to be and which was used and spent in and upon his said customary tenements; for the purpose of making divers, to wit, two grass plots in the said garden, parcel of the same as aforesaid, for the improvement thereof, the same turf, being then and there fit and proper to be so used and spent, and being such quantity as the occasion required, as he lawfully might, &c.: and so justified under the above custom. The *defendant* pleaded a further justification under a custom, that all the customary tenants for the time being of all customary tenements of the manor having a garden, have been used to dig, and carry

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away by themselves, and their farmers and tenants, occupiers of the said tenements, to be used and spent upon the said customary tenements for the improvement of the gardens, parcels of the same; such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be soused, at all times of the year, and so justified digging the turf, &c. for the improvement of the said gardens; also, a further justification, stating a custom that all and every the customary tenants for the time being of all the customary tenements of the said manor, have dug and carried away from the *locus in quo*, by themselves and their farmers and tenants respectively, occupiers of such tenements, &c. to be used and spent in and upon the said customary tenements, for the purpose of making and repairing the banks and mounds *in* and for the hedges and fences thereof respectively, such turf covered with grass fit for the pasture of cattle as hath been fit and proper to be so used and spent, every year at all times of the year, as often and in such quantity as occasion hath required, as to their customary tenements with their appurtenances belonging; and so justified, under the said custom, for the purpose of making divers, to wit, two banks and two mounds, and repairing divers, to wit, two banks and two mounds in and upon the hedges and fences of the said last mentioned customary tenement, the said turf being then and there fit and proper to be so used and spent, and being such quantity as the occasion required, &c. And *lastly*, a custom that the tenants of customary tenements within the manor, have dug and taken away from the *locus in quo* by themselves and their farmers, and tenants, occupiers, &c. to be used and spent, in and upon the said customary tenements for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent.

The *plaintiff* demurred to the said pleas in justification, and the *defendant* joined in demurrer.

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CONST, *in support of the demurrer;* "The custom here pleaded is altogether repugnant to law. The title of the tenant to the use of the common is merely to take the grass by the mouths of his cattle. That right could not exist concurrently with these customs. The first plea is not confined to ancient gardens, but is claimed for gardens generally; so that any person who has 20 acres of pasture, which he chuses to convert into a garden, may claim a right to cover that garden with turf from the common. The custom here stated is also too large and uncertain; for it is not only claimed for the tenant, but for the farmers, servants, and occupiers. Nor does it state any limitation to the improvements which are to be made, and therefore goes to the destruction of the whole of the grass. The third custom, also, is not confined to the banks and mounds of the land held of the manor, nor to the ancient banks and mounds, nor even to such only as appertain to the customary tenements. There are no cases expressly in point, but there are cases which shew that the tenant cannot claim by custom a right to the soil, for that is wholly inconsistent with his tenure. In the *Dean and Chapter* of *Ely* v. *Warren*,* there was a bill to prevent waste in digging the soil: and Lord *Hardwicke* says, the custom here is to dig up the lord's soil for turf, which is a very odd custom, and, applied to any other place, would be bad. But marshy lands are often covered with water, and are of no profit to the tenant. And, therefore, after the time when the soil is left on the land, custom might give a right to take that soil, as a common of turbary is given. A common of turbary is a thing very well known; the tenants can only have a right to take turfs which are not fit for pasture, but for burning only. The customs here set out are entire, and, on the ground of unreasonableness, are bad, for they go to the destruction of the common

* 2 *Atkins*, 189.

for the purpose for which it has been immemorially used."

LAWES, *contrà*. "The immemorial usage is admitted, in support of these customs, by the demurrer; and the only question is, whether any one of them is consistent with the law, and sufficiently reasonable and certain. It is indeed said, that they are inconsistent with a right of common of pasture: But there are various sorts of common such as laid down in *Co. Lit.* 122, (a), 'as common of estovers, of turbary, of pischary, of digging for coals, minerals, and the like,' which latter go to the taking of the soil: and in *Duberley* v. *Page and others*,* there was a custom stated, in the manor of *Harrow*, which is nearly adjacent to this, of digging for sand, which is also a taking of the soil. And, although this may be somewhat prejudicial to the ordinary right of common of pasture, yet it may not be wholly destructive of it, and it is not bad, unless it is wholly inconsistent with the right of common of pasture."

LE BLANC, J. "There may be a right of digging for sand; but how was it stated there?"

LAWRENCE, J. "That right could only be exercised partially."

Lord ELLENBOROUGH, C. J. "In *Batesone* v. *Green*,† a right to dig pipe-clay, which might extend to the injury of the tenant's right of common, was held bad."

LAWES, was not able to state precisely the form of laying the custom in the case of *Duberley* v. *Page*; but he said that in *Hopkins* v. *Robinson*,‡ it was held, that a custom for a copyholder of a manor to have the sole pasture, was good as against the lord, for that it did not operate in exclusion of all the lord's rights. In *Shakespeare* v.

* 2 *Term. Rep.* 391. † 5 *Term. Rep.* 411. ‡ 2 *Lev.* 2.

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*Peppin** a right of common was stated to exist, as well as a right for digging for sand, in the same person. As to the unreasonableness of the custom, however it might operate against other tenants, the lord cannot well complain of the tenant, who takes the turves for the improvement of his lord's lands, especially when there is a fine upon every death and alienation, which will be increased by such improvement."

LAWRENCE, J. "That argument does but ill apply, because the fine may be certain. The right to dig gravel is stated for repairs generally; which is quite as uncertain as the word 'improvements.' You can only contend, that, from the mode of stating the custom, it must be considered to be solely for ancient gardens."

LAWES. "The custom in the third plea is good, for that can only operate for the improvement of the land."

LAWRENCE, J. "But you claim a right to make these mounds and fences, as occasion may require. Do you find any pleadings, which state necessary repair in so loose a manner? Suppose you have occasion to erect a target against the bank, for shooting with arrows, would not that fall within the custom?"

Lord ELLENBOROUGH, C. J. "All the customs are too general. They are stated 'for improvement;' but what sort of improvement is meant? It is not agricultural merely. One man may choose to cover the whole garden with grass, and every part of the ancient tenements may be covered with grass at the expence and to the injury of the commoners. Then the two rights must necessarily interfere. There ought to be some limitation. 'As occasion shall require.' It is not

* 6 *Term Rep.* 741, 748.

stated what occasion; and, therefore, it resolves itself into the occasion of the party who claims it. Neither is it claimed for the repairing of ancient banks and mounds, but it may be for any transient and temporary subdivision of the land, at the will of the tenant. All these customs are, therefore, too indefinite and uncertain to be sustained."

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JUDGMENT for the PLAINTIFF.

RHODES *against* BULLAND.—*Jan.* 28.

Covenant Exception.

Covenant by lessor, *to give the* lessee *of a messuage free ingress and egress through a certain passage, with a yard, with the free use of the pump in the said yard, jointly with the lessor, whilst the same should remain there, paying half the expence of keeping it in repair. Held, this is not an absolute demise of the use of the pump; but the lessor might remove it at pleasure, and an action is not maintainable, though it is alledged that the lessor moved it wilfully and without cause.*

RHODES *versus* BULLAND.

THE *plaintiff* declared in *covenant* upon an indenture of lease, dated the 1st of *January*, 1806, between the *defendant* of the one part, and the *plaintiff* and one *Richard Hawkins* of the other part, whereby the *defendant* demised to the *plaintiff* and the said *Richard Hawkins*, their executors, administrators, and assigns, all that part of a messuage, No. 13, in *Clerkenwell Close*, which then had been lately parted off by the said *defendant* from the part occupied by himself, consisting of, &c. together with all ways, paths, passages, waters, water-courses, lights, easements, profits, privileges, and appurtenances to the said messuages or tenements, and premises belonging, &c. for a certain term thereby demised, subject to a certain

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condition for determining the said term; and the said *defendant* covenanted with the said *plaintiff* and the said *Richard Hawkins*, that he the said *defendant*, his executors and assigns, would, during the said term, pay the land-tax and all other taxes imposed on the said demised premises: and also should and would permit, and suffer the said *Richard Hawkins* and the *plaintiff*, their executors, administrators, and assigns, at all times during the continuance of the said term, to have free ingress, egress, and regress with horses, carts, and carriages, goods and merchandizes, through the gate at the bottom of the yard, belonging to the said messuage or tenement and premises, to the warehouse aforesaid; and also free ingress, egress, and regress, for themselves, friends, and servants, by and through the passage leading from *Clerkenwell Close* aforesaid, through the said messuage or tenement, into the said yard, and the use of the pump in the said yard jointly with the said *defendant*, his executors, administrators, and assigns, whilst the same should remain there, paying half the expences of keeping it in repair. That the lessees entered and were possessed, and that *Richard Hawkins* assigned all his interest therein to the *plaintiff*, and the *plaintiff* assigned by way of breach of the said covenant, that the *defendant* did not permit and suffer the *plaintiff* to have the use of the said pump in the yard jointly with the *defendant* and his assigns, whilst the same remained there; and further, that after the making of the said indenture, to wit, on, &c. at, &c. the said *defendant* unnecessarily and without any reasonable cause, and in order to aggrieve and injure the *plaintiff*, took up, took away, and removed the said pump, contrary to the form and effect of the said indenture, and his covenant in that behalf made as aforesaid, although the same would otherwise have remained and continued there, for the purposes in the said indenture

mentioned, and although the said *plaintiff* was then and there always, and is ready and willing to pay half the expences of keeping the same in repair, according to the said indenture, whereby and not from any want of repair or decay of the said pump, or any necessity, but notwithstanding that the same might and otherwise would have remained there, the said *plaintiff* wholly lost the use of the same, and all profit, benefit, and advantage thereof, &c.

The *defendant* took issue upon the first breach, and demurred generally to the second, and the *plaintiff* joined in the demurrer.

ABBOTT, *in support of the demurrer.* "This is not a covenant, that the pump should remain there, and consequently there can be no action of covenant. As to the allegations of wilfulness and malice, which are contained in the declaration, they are not material; for in covenant, the manner of doing the act may enhance the damages, but cannot give the right of action. Nor is this like the cases which may be cited as to the destruction of the thing, which there is a covenant that the person shall enjoy. In those cases the covenant is absolute, that the party shall enjoy the use of the thing, and this destruction of it, which prevents that enjoyment, is clearly a breach. Here are inserted the words '*whilst the said pump shall remain,*' and the *plaintiff* is allowed only the joint use of the pump; this is, therefore, in clear limitation of the use of it. The words '*with half the expence of the repairs,*' cannot alter the case; and the whole question turns upon the construction of the words of the covenant; the plain meaning of which is, that the *plaintiff* shall have the use of the pump only so long as it continues."

WIGLEY, *contrà.* "It is not necessary that a co-

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venant should be expressed in any particular form of words, but the meaning of the parties is to be collected from the whole of their contract, and the natural construction of this covenant is, that, as long as the pump, in the course of years, shall remain, for so long, the *plaintiff* is to have the use of it; and if the construction in favour of the *defendant* is right, the *plaintiff* might have called upon the *defendant* to repair it. In *Griffiths* v. *Goodhand*,* there was a covenant that the *plaintiff* should for seven years, have all the grains made in the *plaintiff's* brewhouse; breach that the *defendant* put hops in the grains before they were delivered, whereby the *plaintiff* was injured; and it was held good; for it was the intention that the *plaintiff* should have them for the use of his cows. In *Cole's* case,† one lets a house except two rooms and a free passage to them; the lesser was disturbed in the passage, and it was held that covenant lay; but not so for the rooms. It may be admitted, that if the pump were destroyed by accident, the lessor would not have been answerable in covenant, nor, if it were necessary to take it away. In *Hollis* v. *Carr*,‡ in a marriage settlement it was stated that a fine was intended to be levied, and that was held a covenant to levy a fine. And in *Chancellor* v. *Poole*,§ it is clearly held, that no particular words are necessary to make a covenant. This is altogether a question of intention, and it is obvious that the intention of the parties was, that the reasonable use of the pump should be given as long as it should remain, in the ordinary course of things; and the taking it away, without any reason, is a breach of the covenant." He cited also *Branch* v. *Ewington*,¶ *Whitley* v. *Loftus*,‖ *Stevens* v. *Carrington*,** and *Lloyd* v. *Tomkies*.††

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* *Raym.* 464. † *Salk.* 196 ‡ 2 *Mod.* 86.
§ *Dougl.* 765. ¶ *Dougl.* 518. ‖ 8 *Mod.* 190.
** *Dougl.* 27. †† 1 *Term. Rep.* 671.

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ABBOTT. "The cases cited as to the construction of implied covenants do not apply to this case; because there is here an express covenant, and the only question is, what is the meaning of these express words. The words in the covenant, '*whilst it shall remain there*,' have not been considered in the argument for the *plaintiff*; and they can have no meaning, unless they are used as a limitation of the covenant."

Lord ELLENBOROUGH, C. J. "The question turns on the meaning of a covenant contained in a lease where by certain premises are demised, followed by a covenant that the lessor will permit and suffer the colessee and the *plaintiff* their executors, administrators, and assigns, at all times during the continuance of the said term, to have free ingress, egress, and regress with horses, carts, and carriages, goods, and merchandizes, through the gate at the bottom of the yard, belonging to the said messuage or tenement and premises, to the warehouse aforesaid; and also free ingress, egress, and regress, for themselves, friends, and servants, by and through the passage leading from *Clerkenwell Close*, aforesaid, through the said messuage or tenement, into the said yard; and the use of the pump in the said yard, jointly with the said *defendant*, his executors, administrators, and assigns, whilst the same should remain there, paying half the expences of keeping it in repair. If these words '*whilst the same shall remain there*,' were not inserted, I should have thought that a covenant, that he should have the use of the pump, was a covenant, that he should have the use of it, during the lease. But the covenant is qualified with these words; and the question is, whether they do not reserve to the lessor a free uncontrouled election to remove it at his pleasure; that pleasure being governed by motives of any sort whatever. This case can derive very little light from the construction of other covenants in other cases. It is no more

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than saying, as to the use of the pump, you shall have half the use of it; but I will not be bound to keep it up for you; or, if I should choose to erect the pump any where else, which I may do for useful purposes, I shall be at liberty to take it away; In general the demise of the use of a thing is a demise of the thing itself; but still even that does not cast on the lessor an obligation to repair it. Here is an obligation on the lessor to repair it. And he might remove it, although his intention might be capricious or even injurious."

GROSE, J. *Of the same opinion.*

LAWRENCE, J. "I think that the true construction of the covenant is, that the lessor shall be at liberty to remove the pump; but I have had great doubts whether that was really the intention of the parties. For, if it had been his intent to remove it at pleasure, it would have been very easy for him to have added, that it shall not prevent the lessor from removing the pump."

LE BLANC, J. "The owner only meant to covenant, that while he chose to keep the pump there, for his own use, the lessor should have the joint use of it. I see a difficulty in giving any other construction to the words, '*whilst it remains there*,' than, that it is a qualification, by which the lessor intended to reserve to himself that power which he had before over it."

JUDGMENT for the PLAINTIFF.

GORDON and Another *against* CORBETT.—3d *Feb.* 1806.

The motion to refer it to the master to compute principal and interest, &c. is not to be made till the day after interlocutory judgment is signed.

A RULE having been obtained to shew cause why it should not be referred to the master to compute principal and interest upon a bill of exchange,

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COMYN shewed cause, upon the ground that the judgment was irregular; but

THE COURT held, that the regularity of the judgment could not be questioned on this motion.

It then appeared that the judgment had been signed, and the motion to refer, &c. made on the same day. The master said, the practice was, to sign judgment one day, and move at a subsequent day.

Wherefore by THE COURT

THE RULE DISCHARGED.

CLEWLY and Another *against* RAMSBOTTOM.—3d *February.*

After a rule to abide by a plea, the defendant *cannot withdraw a demurrer and plead* non est factum, *and also two special pleas to several breaches in covenant; although the latter pleas only tend to put the facts in issue.*

Semble, he may plead the two special pleas, without the non est factum.

THE *plaintiffs* declared in covenant as between landlord and tenant, for not repairing; with a 2d breach for not quitting at the end of the term. The *defendants* pleaded a sham demurrer, whereupon the *plaintiffs* served a rule on them to abide by their plea; the *defendants* then waved the demurrer, and

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pleaded *non est factum*, and also, first, that they did repair, and to the second breach that they did not hold over. Upon this, the *plaintiffs* signed judgment as for want of a plea. The *defendants* obtained a rule to shew cause, why this judgment should not be set aside for irregularity.

WIGLEY, shewed cause, and contended that after pleading a sham plea, and being ruled to abide by the plea, the *defendants* could only plead the general issue, and could not by the rules of the court be allowed to plead the general issue, and also two special pleas.

WOOD, *contrà*, argued that in effect the general issue, *non est factum*, could never meet the general merits of the case, and, although there were two several pleas, yet they were only to the separate breaches in the declaration; and therefore, formed in fact but one general issue, which put the whole facts and merits upon trial by the country.

Lord ELLENBOROUGH, C. J. "If you had only taken issue upon two of the breaches, you might have been within the equity of the rule, if not the letter of it. But now, having pleaded the general issue with two special issues, you are neither within the letter nor the spirit of the rule. If the mere formal general issue will not bring all the matter of fact in issue, as in this case it does not, you may plead that which is nearest to it."

LAWRENCE, J. Observed that it was evidently a trick to get over the term.

GROSE, J. Expressed a wish, that the practice should be rendered similar to that of the Common Pleas, where the motion for leave to plead several matters is a special motion.

But THE COURT permitted the *defendant* to go to trial, upon the terms of paying costs and giving judgment of the term.

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Clowes and Another against Ramsbottom.

MOSELEY, Bart. *against* STONEHOUSE.—*Feb.* 4.

A certificate, under the stat. 10 *and* 11 W. III. c. 23, *of conviction of a burglar in the parish of* Manchester, *which consists of several townships, having separate parish officers, held, upon demurrer, to exempt a person from serving the office of constable for the separate township of* Manchester, *although the manor of* Manchester *at the leet for which such constable is chosen, is not co-extensive with the parish of* Manchester. *Held, also, that the office of constable is a parish office within the said act of parliament.*

Stat. 10 and 11 W. 3, c. 23, s. 1, Constable. Parish office. Certificate of conviction of felon.

THE *plaintiff* declared in debt, in substance, as follows, that he was on, &c. seised of the manor of *Manchester* in the county of *Lancaster*, in his demesne as of fee; and that he and those whose estate he had from time whereof, &c. had, &c. a *court leet* and view of *frank pledge* within the said manor of, &c. And that within the said manor there is, and from time whereof, &c. has been a custom, that the inhabitants and residents charged to enquire and present, &c. have yearly at that court leet or view of frank pledge, held within the said manor, within one month next after the feast of *St. Michael* the Archangel, elected and have been used and been accustomed to elect two fit and proper persons of the inhabitants and residents within the said manor to be respectively constables of *Manchester* in the county of *Lancaster* aforesaid, for the year then next following, &c. and that they were then accustomed to be sworn in open court. The declaration then proceeded to state, that at a *court leet* held on the 1st day of *October*, 1804, the *defendant* and one *John Railton* then and long before being in-

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habitants and residents within the said manor, and being fit and proper persons in that behalf, were elected to be constables of *Manchester* aforesaid, for the year next following, by, &c. that the *defendant* was then and there requested by the steward to take his oath in open court before the steward, well and truly to execute the said office, but he refused; in contempt of the said court. Whereupon the said steward, in the same county, to wit, on, &c. imposed a fine of 20l., for the use of the *plaintiff*, upon the *defendant*, for such his refusal, &c. and so concluded in debt for the said fine.

PLEAS. The *defendant* pleaded *nil debet*; and further that long before the election of the said *defendant* to be one of the constables of *Manchester*, as in the said declaration mentioned, to wit, at the general sessions of assizes of *oyer* and *terminer* and gaol delivery holden at the castle at *Lancaster*, in and for the county palatine of *Lancaster*, on *Saturday* the 15th day of *August*, in the 43d year of the reign of his present majesty King *George III.* and in the year of our Lord 1801, before the Right Honourable *Richard Pepper*, Lord *Alvanley*, chief justice of our lord the king, assigned to deliver the gaol of the said county of the prisoners therein being, one *Ellen Bradshaw* was convicted of burglariously breaking and entering the dwelling house of *Samuel Hall*, in the parish of *Manchester* in the said county, and stealing thereout one brass pan his property, and divers other articles; and that the said *Richard Pepper*, Lord *Alvanley*, being the justice before whom the said conviction was had, on the 24th day of *August* in the year of our Lord 1801, to wit, at *Manchester* in the said county, by his certificate under his hand, bearing date the same day and year last aforesaid, and which the said *defendant* now brings here into court, did, pursu-

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suant to the said statute in that case made and provided, certify the said conviction in form aforesaid, and that the said *Samuel Hall*, and also *John Holland* and *William Waters*, of the parish aforesaid, did apprehend and take the said *Ellen Bradshaw*, and did prosecute her, so apprehended and taken, until she was convicted of the burglary aforesaid; and pursuant to an act of parliament passed in the 10th and 11th years of the reign of his late majesty King *William III.* intitled "An Act for the apprehending, prosecuting and punishing felons that commit burglary, house-breaking, or robbing in shops, warehouses, coach-houses, and stables, or that steal horses," the said justice did further certify, that by virtue thereof, and of the said act of parliament, the said *Samuel Hall* for the apprehension and conviction aforesaid, should and might be, and he was thereby declared to be discharged of and from all and all manner of parish offices within the parish of *Manchester* aforesaid, as by the said certificate appears; which said certificate according to the tenor of the said statute, was duly inrolled of record, at the general court of quarter sessions of the peace, at *Salford*, in the said county, the 14th day of *October*, 1801, in the 41st year of the reign of our lord the now king, as is in and by the said statute required. And the said *defendant* further saith, that before such election as aforesaid, by a certain indenture made the 3d day of *October* in the said year of our Lord 1801, at *Manchester* aforesaid, in the county aforesaid, between the said *Samuel* by the name and description of *Samuel Hall* of the parish of *Manchester* in the county of *Lancaster*, clerk, of the one part, and the said *defendant*, by the name and description of *John Stonehouse*, of the parish of *Manchester* aforesaid, merchant, of the other part; which said indenture, sealed with the seal of the said *Samuel*, he the said *defendant* now brings here into court, the

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date whereof is the day and year last aforesaid, reciting the said certificate, and that the said *defendant* had contracted and agreed with the said *Samuel* for an assignment of the said recited certificate, in consideration of 35l. of lawful money; it was by the said indenture witnessed, that in consideration of 35l. of lawful money by the said *John Stonehouse* to the said *Samuel* in hand paid, at or immediately before the sealing and delivery thereof, the receipt whereof the said *Samuel* did thereby acknowledge, and from the same did thereby acquit and discharge the said *defendant*, his executors, and administrators; he the said *Samuel* in pursuance of the power given to him by the act of parliament in the said recited certificate mentioned, did bargain, sell, assign, and transfer unto the said *defendant* as well the said recited certificate, as all the right, interest, and demand of him the said *Samuel* thereto, and all exemptions, privileges, benefit, and advantage that might be had and made thereof, or derived therefrom by virtue of the said act of parliament, as fully as he the said *Samuel* might or would have had, or derived, if the said indenture had not been made; as by the said indenture appears. And the said *defendant* avers that the said *Samuel* had not at any time before the making of the said indenture, assigned the said certificate, neither had he made any use thereof to exempt himself from any parish or ward office; and the said *defendant* avers, that the said *Samuel Hall* in the said certificate mentioned, and the said *Samuel Hall* who made the said assignment, are one and the same persons, and not other or different, to wit, at the parish of *Manchester* aforesaid; and that the parish of *Manchester* in the said certificate mentioned from time whereof the memory of man is not to the contrary, hath been divided into and contained, and still is divided into and contains, divers distinct townships, one of such township, during all the time

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aforesaid, being the township of *Manchester* and, that the said manor of *Manchester* and the said township of *Manchester*, from time whereof the memory of man is not to the contrary, have been and still are co-extensive and wholly within the said parish of *Manchester*; and, that the said election of the said *defendant* to be a constable of *Manchester*, as in the said declaration mentioned, was an election of the said *defendant* to be a constable of the township of *Manchester*, being a parish office within the said parish of *Manchester* wherein the said felony was committed as aforesaid, to wit, at the parish of *Manchester* aforesaid; whereby and by force of the statute in that case made and provided, the said *defendant* at the time of such election, was and is exempt and discharged from the said office of constable, to which he was so elected as aforesaid, so being a parish office within the said parish of *Manchester* as aforesaid, to wit, at the parish of *Manchester* aforesaid, in the county aforesaid, and this he is ready to verify; wherefore he prays judgment if the said *plaintiff* ought to have or maintain his aforesaid action thereof against him the said *defendant*.

The *plaintiff* replied, protesting that the said plea is insufficient, &c. that the said parish of *Manchester* in the said certificate of the said last plea mentioned, from time whereof, &c. hath been divided into and contained, and still is divided into and contains, divers distinct townships, one of such townships during all the time aforesaid, being the said parish of *Manchester*, and that the said manor of *Manchester*, and the said township of *Manchester* during all the time aforesaid, have been and still are co-extensive. And further, that the said several townships, in the said parish of *Manchester*, during all the time aforesaid, have had and been used to have, and of right ought to have, &c. several and respective constables for each and every seve-

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ral and respective township, wholly distinct and independant of each other, and that each and every person elected constable hath exercised the office of constable within and for that township only for which such person was so elected, and that no person, who during all that time, &c. hath been elected, &c. hath served the office, within or for the parish of *Manchester* at large, or any where within the said parish of *Manchester*, out of the respective township or townships for which he was elected, and that the said election of the said *defendant*, to be a constable of *Manchester* aforesaid, was an election of him to be a constable of the township of *Manchester* aforesaid; and that the *defendant* by virtue of that election, was confined to serve the said office of constable within the said township of *Manchester*, and ought not nor could, by virtue of that election, serve or exercise the said office of constable within or for the said parish of *Manchester* at large, or any where within the said parish of *Manchester*, except within the said township of *Manchester*; without this, that the said office of constable for which the said *defendant* was so elected as aforesaid, was a parish office within the said parish of *Manchester*, &c.

DEMURRER and JOINDER in DEMURRER.

WOOD, *for the defendant, in support of the demurrer.* "By the statute 10 and 11 *W. III.* c. 23, s. 1, a certificate is granted certifying the parish or place where the burglary is committed, which certificate may be once assigned over, and the original proprietor or the assignee of the same shall, by virtue thereof be discharged from all manner of parish and ward offices within the parish and ward where the felony was committed. The only case upon the subject, is *The*

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Manner of serving Summonses.

King v. *Derbyshire*.* There the appointment of the constable was for the manor of *Birmingham*, that manor comprehending the town of *Birmingham*, and the hamlet of *Deritend*. The question was, whether the certificate was a discharge for the parish of *Birmingham*, and it was held that, as the manor was more extensive than the parish, the certificate did not extend to it, being only for the parish; and the constable was not in that case a parish officer. But *Denison* J. says there, that if it had been co-extensive, it might have been a parish office within the exception. Here the functions of the office are confined within the parish; for they are confined within the township, which is a part of the parish; and if this is not a parish office within the meaning of the certificate, it cannot be of any use in the northern counties of *England*; for in those counties there are no parish officers for the whole of a parish, but for separate townships within very extensive parishes; which townships have separate church-wardens and other officers as all parishes in other parts of the kingdom."

Lord Ellenborough, C. J. "The church-wardens are elected for the parish, although they may execute the duty by agreement between themselves, for a particular district of a parish; as for a certain chapelry."

To shew that constables are parish officers, he cited the statute 13 and 14 *C. II.* c. 12, s. 15, in which statute they are evidently classed with other parish officers; for by s. 16, 'The constables and headboroughs of every parish that shall not apprehend rogues and vagabonds, shall be fined as therein mentioned;' and in the statute 18 *Geo. III.* c. 191, the expression is used constable, tithing-man, and head-borough of the said parish.

* *Burr.* 1182.

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Mosse v. Salomons.

LITTLEDALE, *contrà*. "The word parish is used in the statute adjectively, and coupled with the word office, to denote the office of one who has jurisdiction over the whole of the parish: But the constable in this case has no jurisdiction beyond the township, and is therefore, not a parish officer. The word ward corresponds with a hundred in a county; *Adams* v. *Hilks*.* In the former part of this section of the statute 10 and 11 *W. III.* c. 23, the words are that the certificate shall certify the parish or place wherein the offence was committed. This must imply the whole parish. Then when it comes to mention the exemption 'from all parish and ward offices within the parish and ward wherein the felony was committed,' the word parish must have the same latitude of construction as in the former part, and must, therefore, mean all offices extending over the parish and ward. So by the statute 5 *Ann.* c. 31, s. 1, as a further reward, a certificate is to be made, certifying the conviction, and in what parish the burglary was committed, and that the burglar was taken by the person claiming the reward; and on tendering such certificate the sheriff is to pay 40*l*. This also applies to the whole parish, and the case of the *defendant* is whether by accident or otherwise omitted. And he insisted, that the constable being appointed for the manor and by the leet was not a parish officer within the meaning of the act."

Lord ELLENBOROUGH, C. J. "The simple question in this case is, whether the *defendant* is exempted from the office to which he has been elected by the effect of the certificate; and that depends upon the construction which is to be given to these words in the statute, importing 'that he shall be discharged from all manner of parish and ward offices within the parish and ward where the felony was committed.' It

* *Cro. Car.* 164.

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then this word *parish office* to be construed so strictly as to apply only to a parish office strictly so called, and an office elected by and exercised over the parish; and which will probably exclude many offices which are exercised in the parish, but the limits of which as in this case are not co-extensive with the parish? It is clear, however, that in the statutes cited for the *plaintiff*, as in the 13 and 14 *C. II.* c. 12, and the 18 *Geo. III.* c. 19, the legislature in several instances speaks of the headborough, tithing-man, and every other parish officer, although there is not a constable, headborough, or tithing-man, properly so called, being strictly a parish officer; but only one who exercises his office in the parish and for the parish. In that sense, the legislature used the words in this statute. Otherwise, a great part of the kingdom would be deprived of the full benefit of this act. It has been attempted to explain the words parish and ward officers by a strict construction, as applying only to officers for the whole parish, or for a ward, that is, an hundred in the parish. But that construction is not to be relied upon; for it would comprehend in that case only the head constable."

GROSE, J. "The question is, what construction shall be put upon the words 'parish and ward offices.' Now this was an act of parliament made for the benefit of the public, in order to reward persons apprehending felons, and we may fairly construe such a statute liberally, according to common language. In the statutes which have been cited, the legislature has considered a constable as a parish officer, and it is a fair thing for us to consider that the intention of the legislature in the statute 10 and 11 *W. III.* c. 23, was to give the exemption to a person who by serving the office of constable, deserved so well of the public, as a parish office."

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LAWRENCE, J. "I think that this act of parliament was intended to have a general operation, and not to be narrowed by a strict construction of technical terms. And it would be very mischievous with respect to the northern counties, where the appointment of officers is for a township, and not for a parish, that the overseers and surveyors of the highways, and other officers, should not be exempted by this act, the same as in other counties. If the word parish office is to be taken in its strict sense, this is not a parish office, for the election is at the leet or the sheriff's torn, the jurisdiction of which is not confined to the parish. But as the word *constable* is used in the acts of parliament which have been cited, it is clear that in a more lax sense a constable may be considered as a parish officer; and in *Blackstone's* Commentaries, vol. i. p. 356, it is said, 'the petty constables are inferior officers, in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign *Edward III.*' So that we find by a writer of considerable eminence, that they are considered as parish officers. With respect to the case of *The King* v. *Darbyshire*,* it seems that Mr. Wood has given the true construction to it; namely, that the certificate shall extend to exempt from all offices in a parish, but not from offices extending over the parish and beyond; and that, therefore, as this is within the parish where the felony was committed, this certificate extends to the office in question. In the case cited, there was an attempt to extend the exemption beyond the limits of the place where the felony was committed."

LE BLANC, J. "From the similar words which are used in other acts of parliament, although the office of constable is not in the strict legal sense of the word a parish office, yet we are warranted in such

* *Ubi Supra.*

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an act of parliament which is to operate generally, and giving the benefit of the exemption to the office of constable. It is clear from the acts cited, that the legislature has sometimes considered the constable as a parish officer, and that will sufficiently justify us in giving the same construction to the word *parish-office* here. It is admitted by Mr. LITTLEDALE, that, notwithstanding, the appointment of constable is not from the parish, but is from the *leet* and for the manor, still, if, by accident, the manor and the parish happen to be co-extensive, the person having such a certificate is exempt. But that goes to admit, what is now contended for, by the *defendant*; for that makes the construction of the word *parish office* not strictly literal. Then the words of the act are not extended beyond their fair import, if the jurisdiction of the constable goes over the township and district which does not extend beyond the limits of the place where the felony is committed; but it might in the case of *The King* v. *Darbyshire* have extended to a place where the party had no merit in the respect mentioned in the act of parliament. This is the very reverse of that case."

JUDGMENT for the DEFENDANT.

ZOUCH on the demise of THOMAS FORSE *against* HENRY FORSE.—4th *Feb.*

Occupancy. Copyhold. Stat. 29 Car. II. c. 3, 14 Geo. II. c. 20, Ejectment.

A. is admitted tenant of a copyhold in reversion, for the life of B. after the deaths of C. and D.; before the reversion or remainder vested in possession, A. the grantee died, and afterwards, upon the death of the first taker and his cestui que vie, *the administrator of A. was admitted, as administrator, for the life of B. and brought ejectment: Held, that he could not recover; for copyholds are not within the statutes of special occupancy, viz. the statute* 29 Car. II. c. 3, *and* 14 Geo. II. c. 20, *and the admi-*

sion gave no title and granted no interest, but such as he claimed as administrator.

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Zouch dem. Thomas Forse *versus* Henry Forse.

THIS was an *ejectment* to recover one moiety of a copyhold tenement in the manor of *Froom Vanchurch*, in the county of *Dorset*, and it was tried before Mr. Justice Le Blanc, at the last assizes for the county of *Dorset*, when the jury found a verdict for the *plaintiff*, subject to the opinion of this court on the following case:

At the court baron of his grace the Duke of *Bolton*, for his manor of *Froome Vanchurch*, in the county of *Dorset*, held the 24th day of *July*, 1761, the lord of the manor, by his steward, granted to *Robert Forse* the reversion of a moiety of a copyhold tenement, by copy of court-roll as follows "at this court the lord of the manor, by his steward, granted to *Robert Forse* of *Porten*, in the county of *Dorset*, yeoman, the reversion of a moiety of a customary tenement, and forty-six acres of land, meadow and pasture, with the appurtenances within this manor, now in the possession of *William Forse*, which he claimed to hold for his life, by copy of court-roll, of this manor, dated the 29th day of *April*, 1725, remainder by another copy dated the 6th of *May*, 1740, to *Henry Forse* son of the said *William Forse*, for his life, *to have and to hold* the reversion of the said premises with the appurtenances to the said *Robert Forse* for the life of *Henry Forse*, the son, (aged ten years,) at the will of the lord, according to the custom of the said manor, from and immediately after the surrenders, forfeitures, or other determinations of the estates of the said *William Forse and Henry Forse* his son, of and in the said premises, paying the yearly rent of *fifteen shillings*, and a herriot, when it shall happen, and by and under such other works, suits, services, and customs, as are usually done and paid for the same; and for such estate in reversion the said *Robert Forse*

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(as sole purchaser) paid the lord, for a fine, 38l. but the admittance and fealty of the said *Robert Forse* and *Henry Forse* his son, is respited. *William Forse* continued seised till the year 1764, when he died; and upon his death, the said *Henry Forse*, the son of *W. Forse*, entered and continued seised till 1795, when he died, and upon his death, his widow entered and continued in possession till 1803, when she died. The above named *Robert Forse*, to whom the reversion was so granted, died intestate in 1775, leaving six sons, *William Forse* the eldest, *Henry* the *cestui que vie*, named in the said grant, *Thomas Forse* the lessor of the *plaintiff*, and three others, and upon his death, administration of his effects was duly granted to two persons, who are since dead; after which, viz. *February* 1st, 1804, administration *de bonis non* was granted to the lessor of the *plaintiff*, who, on the 25th day of *August*, 1804, was admitted tenant to the said moiety for the life of the said *Henry Forse*, the son of *Robert Forse*. No evidence was produced of any custom in the manor, that the *cestui que vie*, not taking by the *habendum*, should have any beneficial interest. The question for the opinion of the court is, whether the *plaintiff* is entitled to recover?

TAUNTON, W. P. *for the plaintiff*. "The question in this case is, whether an executor *de bonis non* of one who was admitted tenant in reversion of a copyhold *per autre vie*, can maintain ejectment for the same. The lessor of the *plaintiff* founds his title upon the original grant of the reversion to his intestate on the 24th of *July*, 1761, and on the admission of himself, 25th *August*, 1804. He then divided the question into four points as follows: first, what estate the lessor of the *plaintiff* would have at common law before the statutes of special occupancy 29 *Car. II.* c. 3, and 14 *Geo. II.* c. 20; and he contended on this

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head, that even before these statutes, the estate would still have subsisted, and would not have been determined by the death of the grantee for life. Secondly, that, by these statutes, the copyhold was in the lessor of the *plaintiff* as special occupant; notwithstanding that by the common law, there could not be an estate by general occupancy of a copyhold, because upon the death of the tenant, the estate was in the lord. Thirdly, if the lord is entitled to enter, he is only entitled to enter as trustee for the executor the *tenant per autre vie,* and even a court of law, seeing where the right is, and seeing the ground of the admission of the lessor of the *plaintiff,* will give effect to his title. Or fourthly and lastly, that the admission passed a right of entry to the lessor of the *plaintiff* on which he is entitled to recover. First, all grants must be taken most strongly against the grantor; and a grant to a man of a copyhold, enables him to alienate for his own life, notwithstanding his assigns are not mentioned in the grant; and then of such an estate as this which is to continue for the life of another, the administrator of the grantee is the assignee in law. There is indeed as to this point no decided case, either the one way or the other; but yet, at common law, there can be no estate by occupancy of a copyhold, because as it is said in *Smartle* v. *Penhallow,** the lord might enter, and it is in that case considered as settled law, although there is a *dictum* to the contrary in *Coke's* Copyholder;† and surrenders are construed as conveyances at common law, *Fisher* v. *Wegg,*‡ *Burgess* v. *Wheat,*§ *Bucknal's* case.¶ If a lease is made to A. during the lives of B. and C., by the death of one of them, the estate is not deter-

* 6 *Modern*, 66. † *s.* 56, *p.* 115. ‡ 1 *Peere Will.* 14.
§ 1 *Bl.* 107. ¶ 5 *Co.* 9 *b.*

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mined, though it would be otherwise if it were a condition instead of a limitation. So in *Rosses'* case,* a lease to A. and his assigns for life, and for the lives of B. and C. is a lease for three lives. So a grant to J. S. is a grant for life; and a grant to J. S. for the life of A. and B. is a grant for and during the life of either of them.† The principal point, however, is in case the grant by the common law determined by the death of the grantee, whether by the statute 29 *Car. II.* c. 11, s. 9, it is continued to his personal representative, who is admitted by the lord under that grant."

Lord ELLENBOROUGH, C. J. "In point of fact, he is only admitted as administrator *de bonis non*, and there are no terms in the admission which amount to a grant; for that was intended only to invest him with the title which he claims as administrator. There are no words of grant made use of by the lord."

TAUNTON. "The words of the statute are '*any estate per autre vie*, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor or by three or more witnesses. And if no such devise thereof be made, the same shall be chargeable in the hands of the heir if the same shall come to him by reason of special occupancy as assets by descent as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands."

Lord ELLENBOROUGH, C. J. "Have you any cases

* 5 *Co.* 13, *b.* † *Cro. Eliz.* 181. *Cro. Jac.* 282.

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to shew that such an admission as this will enure as a grant."

TAUNTON. "This estate is supported in the personal representative by the effect and operation of the statute; and there is a great analogy in this respect between copyholds and hereditaments incorporeal, which are held within the statute, although at common law there could be no occupancy of a rent, as an incorporeal hereditament, but there might be a special occupancy,* *Ripley* v. *Waterworth*,† *Holden* v. *Smallbrooke*,‡ *Seymour's* case,‖ *D. of Devonshire* v. *Atkins*,§ *Lowe* v. *Burron*.¶ And it is now so held, because, by the statute of frauds any estate which is capable of being devised by the tenant *per autre vie*, who might thus have created a special occupant, will now pass to the executor. And the same reason holds that the estate *per autre vie*, in copyholds, should be preserved as in incorporeal hereditaments; for the estate, however limited to any heirs, can only extend to the duration of the life of the last *cestui que vie* named in the grant. There is, indeed, no case at law; but there are many in equity, that copyholds *per autre vie* should go to the personal representatives."

LAWRENCE, J. "Those are only cases of special occupancy where there was not a general occupancy."

TAUNTON. "There are also cases of resulting trusts in equity, where he who pays the fine has the estate to him and his representatives: the *cestui que vie*, being only the supporter of the estate for his benefit. As where a copyhold was granted to A. for the lives of A., B., and C.; A. died intestate, his administrator took the estate, as having the title of the first taker

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* 2 *Ro. Ab.* 150. *Salk.* 189. † 7 *Vesey*, Jun. 440, 448. ‡ *Vaugh.* 187, 201. *Co. Litt.* 41. ‖ 10 *Co.* 96. § 2 *P. W.* 381. *Dy.* 328, *pl.* 10. 2 *Bac. Ab.* 277. ¶ 3 *P. W.* 262, and 1 *Vern.* 237, *pl.* 5.

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who paid the fine, the other lives being only in nature of trustees; *How* v. *How*,* *Clark* v. *Danvers*.† And where a copyhold was granted to the husband and wife, and J. S. for their lives *successive*, but it appeared by the rolls that the fine was paid by the husband and wife; J. S. was decreed a trustee for them; *Benger* v. *Drew*,‡ *Withers* v. *Withers*,§. But Lord *Hardwicke* there says, that the statute of frauds does not extend to copyholds."

Lord Ellenborough, C. J. "If so, there is no general occupancy of copyholds; and the admission of the lessor of the *plaintiff* was only upon an invalid claim; then, unless there are some words of grant in the admission which are substantively a grant to him, the admission will not help the case."

Taunton then contended, "that although in general the admission was according to the surrender, and although, on the surrender, nothing operated by way of grant; yet the admission by the lord made the lessor of the *plaintiff* tenant at will. For this he cited 2 *Leonard*, 210, where it is said, 'it was holden by the court, that if copyholder in fee dieth seised, and the lord admits a stranger to the land, *who entereth*, he is but a tenant at will and not a disseisor to the copyholder who hath the land by descent, because he cometh in by the assent of the lord,' &c."

Lord Ellenborough, C. J. "If you are right in this point, the admission gives a title in every case."

Lord Ellenborough, C. J. *(Without hearing the other side)*. "The counsel for the *plaintiff* having very properly stated those cases which operate against him, as well as those on which he would rely, it is un-

* 1 *Vern.* 415. † 1 *Ch. Ca.* 310.
‡ *Peere. Will.* 781. § *Amb.* 151.

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necessary to hear the other side. This is a claim made by the *administrator de bonis non*, as special occupant under the statutes 29 *Car. II.* c. 3, and 14 *Geo. II.* c. 20, of a copyhold estate, to which as intestate he was admitted in reversion *per autre vie*; but that title cannot subsist, unless copyholds are the subject of occupancy, and it has been decided that they are not, nor are they within the statute 29 *Car. II.* c. 3, and 14 *Geo. II.* c. 20. Then it is too much to say that, if the lord admits a person *eo nomine* as administrator, in which character he could not claim, it shall, as against the lord, convey an interest as if there had been an express grant. Neither of these points being sustainable, the *plaintiff* has no title at law."

Lawrence, J. "It never has yet been determined that independently of the statutes the lord had not a right to enter, upon the death of the grantee; or that, without express words the effect of the statutes could be to take away that right of entry which he has. The object of the statutes was to prevent persons from taking estates as occupants, to which they had no claim, but it was never intended that the right of the lord of the manor, who had a right at common law to enter on the death of the grantee, living the two lives, should be taken away. Sir *W. Blackstone*, says in his *Commentaries*,* 'these statutes must not be so construed as to create any new estate, or keep that alive, which by the common law was determined, but merely to dispose of an interest in being to which by law there was no owner, and which, therefore, was left open to the first occupant.' Now copyholds were held never to be the subject of occupancy, because the freehold is never out of the lord; and if so, there is nothing on which the statute can operate. As to the other point,

* *Vol. II. p.* 2[illegible].

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if the admission is looked to, there is nothing like a grant. The person admitted claims as *administrator de bonis non* of the original grantee for the life of *Henry Forse*, and thereupon he is admitted; but by this the lord does not mean to grant any thing but that which the copy granted to the original grantor, and which the administrator could claim under it."

LE BLANC, J. "In this case, if the *plaintiff* had a title, the general words would operate to the prejudice of the lord against the rule that general words of a statute shall not operate to prejudice the lord, and here they will materially do so."

JUDGMENT for the DEFENDANT.

SWAN and Others *against* STEELE, Clerk, and ROBERT WOOD.—Feb. 7th.

Partners. Bill of exchange. Fraud and collusion.

A. and B. were partners and grocers, and also partners with C. as cotton dealers, trading under the firm of A. and B. C. not being known to be a partner. Being indebted to D. for grocery goods in the firm of A. and B. and having accepted a bill which was dishonoured, they indorsed to D. a bill belonging to the partnership in the cotton trade as a security, D. not being cognisant of the fraud: Held, that C. was liable as indorser of this bill to D. there being no fraud or collusion in him.

SWAN and Others *versus* STEELE and Another.

THIS was an action on promises, in which the *plaintiffs* declared in the first count of their declaration, on *a bill of exchange*, dated 26th *August*, 1805, drawn by one *David Maitland* on *Walter Campbell* and Co. for 342l. payable to the order of the *defendants* and one *George Payne*, deceased, three months after date, and indorsed by the *defendants* and *Payne*, under the firm of *Wood* and *Payne* to the *plaintiffs*, and which bill *Walter Campbell* and Co. had accepted;

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and in other counts the *plaintiffs* declared for goods sold and delivered, money paid, laid out, and expended, had and received, and an account stated; to which declaration, the said *defendant Steele*, pleaded the general issue of *non assumpsit*; and the *defendant*, *Wood*, suffered judgment by default. The cause came on to be tried before the Right Honourable Lord ELLENBOROUGH, in *London*, at the sitting after last *Trinity* term, when the jury found a verdict for the *plaintiffs*, damages 368l. 5s. 4d. and costs 48s. subject to the opinion of the court on the following case: That *Wood* and *Payne* mentioned in the pleadings, carried on the business of wholesale grocers in *Liverpool*, under the firm of *Wood* and *Payne*, from *January*, 1802, until *January*, 1804; that the *defendant Steele*, became a partner with the said *Wood* and *Payne*, in the month of *May*, 1802, and so continued till *January*, 1804, in the business of buying and selling cotton, which business was carried on also under the firm of *Wood* and *Payne*, and at their counting-house: but that the said *defendant Steele* was never in any manner interested in the grocery business, that the said *defendant Steele*, took no active part in the cotton concern, nor was it known to the world or to the said *plaintiffs*, that he was a partner. That the *plaintiffs* sold the said *Wood* and *Payne* as grocers, a quantity of sugar; for which they gave their acceptance, in the firm of *Wood* and *Payne*, at four months, due 11th *October*, 1803, and not being able to provide for it when due, *Wood* and *Payne*, on the 8th day of *October*, 1803, delivered to the *plaintiffs* the bill mentioned in the declation, due the 29th day of *November*, with others, to provide for that acceptance, and that the said bill was indorsed by either *Wood* or *Payne* in the firm of *Wood* and *Payne*, without the actual knowledge of *Steele*, as all other bills on the cotton concern were; that the said bill was paid to the said *Wood* and *Payne*,

as cotton dealers, than by the drawer thereof for cotton sold to him in which the *defendant Steele*, was as aforesaid interested, and that the name "*David Maitland*," thereto subscribed as the drawer, is the proper hand-writing of *David Maitland* of *Wigan*, to whom the cotton was sold; that the said bill has been dishonoured, of which the said *Wood* and *Payne* had due notice.

That the said *Wood* and *Payne* became bankrupts, on the 16th day of *January*, 1804, and that the effects of the said cotton concern, are insufficient to discharge its debts; and that the said *Samuel Steele* when he has discharged those debts, will be a creditor of the concern.

The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover? If the court shall be of opinion they are so entitled, then the verdict to stand; otherwise a verdict to be entered for the *defendant Steele*.

WOOD, *for the plaintiffs*. "*Payne* being partner had authority to dispose of the partnership effects, for such purposes as he thought proper. One partner may sell the effects, he may also release debts; but, if he misapplies the money or effects, he is answerable in account with the other partners. This is a good disposition to third persons, unless those third persons can be affected with the fraud contrived by the partner. The other partners are bound by it unless there is fraud."

Lord ELLENBOROUGH, C. J. "Unless there is collusion."

LITTLEDALE, *contrà*. "The *plaintiffs* are not entitled to recover. One partner cannot pledge the goods of another, and this is properly a mere pledge.

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of a bill of exchange. The *plaintiffs* did not sell to *Steele* but only to *Wood* and *Payne*; and took a particular security by the acceptance of *Wood* and *Payne* for the goods. The case states, that they, not being able to provide for their acceptance, delivered over this as a security, and the *plaintiffs* did not therefore take it in the ordinary course of trade, but as a pledge. He cited *Shireff* v. *Wilks*,* where it was held that two of three partners who had contracted a debt prior to the admission of the third partner could not bind him, without his assent, by accepting bills drawn by a creditor upon the firm in their joint names, but such security was fraudulent and void as against the third partner; and contended that the *plaintiffs* must have known of the partnership and that *Wood* and *Payne* were misapplying the bill, or else, instead of taking the bill as a collateral security, they would have received the indorsement in payment and discharge *pro tanto*."

Lord ELLENBOROUGH, C. J. "I think that the knowledge which is argued for in the *plaintiffs*, will not vitiate a transfer actually made to them, without cognizance of the facts previous. This bill which is indorsed by the two was the property of the three partners. By the indorsement they had a right to make that transfer, and the *plaintiffs* would incur a loss now if it was set aside, because they would not have that other security, which they would have obtained before. But the discovery of the misconduct of one or two of these partners cannot vitiate a transaction which vested a regular interest. The right to the bill passing by indorsement cannot now be divested by the subsequent knowledge, that it is against the will of the third partner."

* 1 *East*. 48.

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GROSE, J. and LAWRENCE, J, were of the same opinion.

LE BLANC, J. "The bill must have been indorsed virtually by all three partners, or else the *plaintiffs* could have no right. The interest therefore passes in it."

JUDGMENT for the PLAINTIFF.

CROSSE and ELIZA LAWRENCE CROSSE, his Wife, Administratrix of JOHN REEDER, *against* SMITH and Another, Executors of J. GRIERSON.

Executor. Devastavit.

A. and B. were executors of C., of whom B. was a simple contract creditor; A. having received 400l. of the assets of C. remitted them to B. to pay a bond debt due to D. and at the same time gave notice thereof to D. B. was then in good credit, but failed and became bankrupt twelve months afterwards, and had then no assets of C. D. proved under B.'s commission and received a dividend. Held, that A. having received assets was answerable at law for the misappropriation by B. Semble, *that in all the cases at law and in equity the receipt of the money is sufficient to charge the executor.*

CROSSE and Others *versus* SMITH and Another.

THIS was an action of *debt* on a bond, in the penalty of 100l. given by *James Grierson* to *John Reeder*, dated 10th of *May*, 1793, conditioned for the payment of the principal sum of 500l. and interest, at *5 per cent.* on the 10th of *May*, 1796.

The declaration stated the bond. The *defendant Munt*, pleaded *plene administravit*, except as to 468l. 15s. and as to that sum, his bankruptcy and the obtaining and allowance of his certificate, specially alledging that the said 468l. 15s. and no more of the effects of *Grierson* having been received by him as

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such executor were, before he became bankrupt, misapplied, eloigned, and wasted by him; that the *plaintiff Eliza Lawrence* after Mr. *Reeder's* death, and before her marriage with the *plaintiff John Webber Crosse*, proved the said 468l. 15s. as a creditor under *Munt's* commission, as a debt from *Munt*, as such executor as aforesaid, to her as the administratrix of the said *John Reeder*, at the suing out of the commission, and secured by the bond in the declaration mentioned, and that a dividend was duly declared and made under such commission, of which the *plaintiff Eliza Lawrence* had notice. To this plea of *defendant Munt*, the *plaintiffs* replied, denying that he had fully administered, except 468l. 15s. and also denying that the *plaintiff, Eliza Lawrence*, proved the said 468l. 15s. as a creditor under *Munt's* commission as a debt, &c. or secured, &c. in manner and form as alleged by the plea; and on these points issue was joined.

The *defendant Smith* pleaded, first, *plene administravit*, except as to 4l. 17s. and secondly, *plene administravit*, except the said 4l. 17s. before he had notice of the bond, and that he had not then, nor had at the time when he first had notice of the said writing obligatory, or at any time since, goods, &c. except the said 4l. 17s. The *plaintiffs'* reply taking judgment of the assets confessed and averring that the *defendant Smith*, had at the time when he had first notice of the said writing obligatory, besides the said 4l. 17s. goods, &c. to the amount of the debt, and on these points issue was joined.

This cause came on to be tried before Lord Ellenborough, at the sittings after *Trinity* term, 1805, when a verdict was found for the *defendant Munt*; and for the *plaintiff* against the *defendant Smith*, damages 1s. costs 40s.; and that the *defendant Smith*, had

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assets, *ultra* the 4l. 17s. to the amount of 400l. only, subject to the opinion of the court on the following case:

James Grierson, deceased, duly executed the bond to *John Reeder*, deceased, at the time it bears date. *Grierson*, paid 100l. on the bond in his life-time, and died on the 17th of *February*. In the same year the *defendant Smith* having 400l. of *Grierson*'s effects then in his hands, as his executor, remitted that sum to the *defendant Munt*, his co-executor, for the purpose of paying this bond, of which he had had notice from *Munt*, as appeared by the following letter written by the *defendant Smith*, to Mr. *Reeder*:

"Mr. *Smith*'s compliments to Mr. *Reeder*, and begs to inform him, he remitted Mr. *Munt* 400l. to pay his bond on the 17th of *February*, 1795, by a draft on Messrs. *Whiteheads*, bankers, in *London*, and that Mr. *Munt* acknowledged the receipt thereof, the 19th of *February*, 1795:

"*Southampton*, 28*th July*, 1796."

No other evidence was given of the *defendant Smith*'s knowing of the bond, or the terms of the condition. At the time of the remittance, *Munt* was in good credit, and *Smith* knew that he was a simple contract creditor of *Grierson* to a larger amount than 400l. *Munt* applied the 400l. towards the payment of the simple contract debt due from *Grierson* to him; though he knew of this bond, and had received the 400l. from *Smith* to pay it. *Munt* became bankrupt on the 4th *July*, 1796, as stated in the pleadings. *John Reeder* died in *October*, 1797, intestate, leaving the *plaintiff*, *Eliza Lawrence Crosse*, then *Reeder*, his only daughter, who took out administration to him. On the 21st of *November*, 1798, the *plaintiff*, *Eliza Lawrence Crosse*, (then *Reeder*) proved the money then due for principal and interest on the bond, being 468l. 15s. as a debt under *Munt*'s commission, whereon a dividend has been

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declared, of which she had notice, as stated in the pleadings. *Munt* has obtained his certificate.

Munt had no assets of *Grierson* in his hands, at the time he became a bankrupt, on which the *plaintiff Eliza Lawrence Crosse*, could found the proof of a debt against him as having committed a *devastavit* to the amount so proved, without including the money he had so received from *Smith*. She knew the 400l. had been remitted by *Smith* to him, for the purpose of paying the bond, at the time she proved the debt under the commission. Subsequent to all these proceedings, and before the commencement of the action, the *plaintiffs* intermarried.

The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover against the *defendant Smith?* If the court shall be of opinion that they are, then the verdict to stand; if not, then a verdict to be entered for the *defendant Smith*.

Dampier, *for the plaintiff*. "The *defendant* in this case must rely upon the plea of *plene administravit*; for the issue on the notice was found against him. If a trustee receives money, he only who receives is liable to be charged with it, and not his co-trustee; but in the case of executors, if money is received by one of two executors, both are liable as against creditors, but not as against legatees: *Churchill* v. *Hopson*.* Here the *defendant* is an executor and not a trustee, and the *plaintiff* is a creditor and not a legatee; and in *Lemun* v. *Fooke*,† it is held that it is immaterial, whether the bond is forfeited at the time of the testator's decease; for, notwithstanding it be not, it shall be preferred to simple contract debts. And, where, by the act of one of the executors, the estate comes to the hand of another, the former executor will be liable, in the same manner as if he had suffered another per-

* 1 *Salk.* 318, 2 *P. W.* 241. † 3 *Levinz*, 57.

son to receive the money. Lord *Thurlow* says, in the case of *Sadler* v. *Hobbs*,* that the mind of the court hath changed in various instances in cases of trustees; but in cases merely in regard to executors it has continued invariable. He cites *Gill* v. *the Attorney General*,† that where one executor takes the money, but of his own authority, his companion shall not be charged; but if he puts the money in the hands of his companion, he shews that he had the power to secure it, and that his companion for some reason was permitted to obtain the possession of the money. Here *Smith* had the money in his hands, and it was for his own convenience that he put it into the hands of the co-executor. And the question of whether the joining in a receipt by one executor will make him liable was very anxiously considered by Lord *Alvanley* in the case of *Scurfield* v. *Howes*,† and he held that in general it did. These cases were all cases of failure of a party; but this is a case of *devastavit*, for he put it into the hands of *Munt* whom he knew to be a simple contract creditor, and to have an interest in wasting the property by payment of his own debt. In the case of *Balchen* v. *Scott*,§ one of the grounds upon which the executor was held not liable was, because he had never acted; but here both administered, and the other cases were not cited in that case. So in *Bacon* v. *Bacon*,¶ it is said that courts of equity have lately leant in favour of executors; but in the case there was a strong clause that neither of the executors should be answerable for the other, and such a clause was relied upon in the case of *Westley* v. *Clarke*,‖ where Lord *Northington* held the executors not liable who had signed a receipt, but had not received any part of the money; and the whole of the doctrine now stands as it

* 2 *Bro. C. C.* 116. † *Hardres*, 314. ‡ 3 *Bro. C. C.* 90
§ 2 *Vezey*, Jun. 678. ¶ 5 *Vezey*, Jun. 331.
‖ 1 *Peere Williams*, 83. *(n.)*

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is laid down in the case in *Hardres.** Secondly, supposing the *plene administravit* is not made out, it is to be considered whether the proceedings under *Munt*'s commission will bar this action against *Smith*. By the statute 10 *Anne*, c. 15, s. 3, the discharge of a bankrupt by his certificate is not to be a discharge of his partners, joint-obligors, or contractors, but they remain still liable. This then was a joint demand against *Munt* and *Smith*, although they may sever in pleading. The money having been received by *Smith*, and having by his permission got into *Munt*'s hands they are liable jointly for the whole, upon the authority of *Gill* v. *the Attorney-General*,† and the case is within the statute. If therefore, it is objected that we discharged *Smith* by resorting to *Munt*; and if it is a joint debt, it is answered by the statute; but if it is a several remedy, then there is nothing to shew that *Smith* is not now answerable. He is answerable, because he had assets in his hands, and so is *Munt* also; and then, just as upon a bill of exchange where several parties are severally liable, you may sue each."

Marryat, *contrà*. "The proof under *Munt's* commission was allowed upon the authority of the case *ex parte Llewellyn*‡ and *Smith* had no other funds whereby he could be charged, except this money which was paid over to the other executor. If this is suffered to charge him, it will be very inconvenient in all cases of executorship, for it will prevent all executors from making any merely partial interference in the administration of the effects. If two executors live at distant places, and money is to be paid by one, for which he has not funds without the aid of the other, it will be very inconvenient to charge the one who ends it to be applied

* *Ut Supra.* † *Ut Supra.* ‡ *Cooke's B. L.* 135, *Ed. IV.*

in due payment, if it is misapplied by the other executors, were formerly held to more strictness than in modern times. For, if they received principal and interest on a bond which was forfeited, it was a *devastavit;* and if one signed a receipt, he was bound by it, although he never had the money; but the result of the decisions is now, that if one acts *bonâ fide* he is relievable. In *Churchill* v. *Hobson** the decree is stated by Mr. *Cox* in his notes; and the order is, that, if the *plaintiff* joined in any receipt with the *defendant Goodwyn* the co-executor, for sums which were paid to *Goodwyn*, or received any money as part of the testator's estate, and paid it over to *Goodwyn*, before the date and issuing of the commission of bankruptcy against him, the *plaintiff* is to be discharged thereof. There Lord *C. Harcourt* held, that, as against legatees, the executor was not to be liable, though he might as against creditors who were entitled to all the benefit of the law. How far is this rule to be extended? If it is necessary to pay money into the hands of a banker and he fails, or if he is robbed, is the executor to be liable? An executor should not be answerable for more diligence and care than an ordinary bailee."

Lord Ellenborough, C. J. "He has an absolute property, and is not like a bailee.

This is quite a novel question in a court of law, and there is no case to shew, that an executor is answerable, unless there is misconduct; but here is no misconduct, and the party is barred by having resorted to the other executor."

Dampier, *in reply.* "As to the third point, that we adopt the act of *Smith* in the payment to *Munt*, by proceeding under the commission, and that we have discharged *Smith*, because *Smith* could not prove un-

* *Peere. Will.* 242-3, *(n)*

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der *Munt's* commission, which otherwise he would have a right to do; the answer is, that, if *Smith* was then liable, he could have sued *Munt* then; if not, he may sue now. As to this point, with respect to executors, Lord *Thurlow* says, in *Sadler* v. *Hobbs*, that 'the law is not altered, there is a very material case in *Croke Car.* 312, *Foster* v. *Townley*, but better reported in *Bridgeman*, 95, in which it was decided upon principles of law as well as of equity, that a trustee joining in the receipt shall be liable, because he appears to have received the money.' Here he knew that *Munt* would have an interest in the misapplication of the money. He had notice of the simple contract debt."

Lord Ellenborough, C. J. "We must presume that the payment over was *bonâ fide*."

Lawrence, J. "He put no more trust in *Munt*, than the testator put in him. Did he know that *Munt* had a claim? He might have known that he had no claim as against the bond."

Dampier. "If an executor trusts a banker, he does it at his own peril. As to not being answerable on a robbery, that may be a different question; but this is not the case of a loss by accident, and the case of a bailee is not at all applicable."

Cur. adv. vult.

And now the judgment of the court was delivered to the following effect, by

Lord Ellenborough, C. J., after stating the case. "The question is, whether the *plaintiff* is entitled to recover as against *Smith*. The only material question is, whether *Smith*, the *defendant*, having once as the executor of *Grierson*, deceased, had 400*l.* of the effects of *Grierson* in his hands liable to the payment of the bond of the *plaintiff*, and capable

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of being so applied, is discharged in point of law, by having paid it over to his co-executor; but who was afterwards guilty of a *devastavit*, by misapplying the sum so received to the payment of his own debt. It is further suggested also, that the *plaintiff Eliza Crosse* has discharged *Smith* by receiving a dividend under the commission of *Munt*, the other executor; but that is only an extinction of the *plaintiff*'s debt *pro tanto*, that is, to the amount of the dividend to be received, and does not operate as a bar to this action, as it is pleaded, and it is not necessary to take up further time in the consideration of so clear a proposition. As to the other point, it has been held, that where by any act or agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable. In *Sadler* v. *Hobbs*,* Lord *Thurlow* founding himself on the case of *Churchill* v. Lady *Hobson*, was of opinion that if one executor puts money into the hands of his companion, he is liable for the sum received. In *Westley* v. *Clark*,† Lord *Northington*, C. held, indeed, that where executors had called in a mortgage debt, and both had signed the receipt, the executor who had not actually received any part of the money was not liable to repay it. He laid great stress on the receiving of the money. He says, 'the material part of this transaction is the receiving of the money, which was by one of them, the other signing the receipt is only form. I am therefore of opinion, that the *defendants Clarke* and *Betts*, (who were the other executors that signed the receipt,) are not liable to make good the sum of 600*l.* no part of which came to their hands, the same having been received by *A. C. Thompson*, the bankrupt.' It appears, therefore, from this, that the ground on which that case was decided, was the fact of

* 2 *Bro. C. C.* † 1 *Peere Williams*, 83, *(n)*

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their having received no part of the money, and that if they had, Lord *Northington* would have held, that they were liable with the other. In *Hovey* v. *Blakeman*, the opinion of the Master of the Rolls particularly applies to the doubt, whether joining in a receipt and doing some necessary act to enable the partner and co-executor to receive money, made him liable; yet if he had received the money himself, it would never have been made a doubt; and it appears there, that the money was applied by him. Previous to the case of *Bacon* v. *Bacon*,* it was never thrown out that it is sufficient that the business was transacted in the ordinary manner, and that unless there were some circumstances to awaken suspicion, it would be right to confirm it. If this were so, it would follow that an executor would be considered as a mere ordinary bailee; and there is no case at law, that an executor, once become responsible for the assets by the actual receipt of money, can found his discharge in respect thereof, either on the apparent security of his actual agent, or the reasonable confidence which he may repose in his co-executor, which is, in the event, disappointed. There is no case, that, like a bailee, he is not responsible for loss, except in case of negligence. Here the hardship of the case would induce us to go as far as possible for the relief of the party, but we are obliged to pronounce that *Smith* having received the money, and paid it over to *Munt* to be applied in payment of the *plaintiff*'s debt, but such application being disappointed by *Munt*, he is liable, as much as if the misapplication had arisen from any other accident, and was less entitled to favour."

JUDGMENT for the PLAINTIFF.

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* 5 *Vezey*, Jun.

The KING *against* DOBSON and Another.

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A person acting *as collector of the income tax under the statute* 43 Geo. III. c. 69, *and by the acknowledged appointment of the commissioners, although his assessment is not duly signed under* 43 Geo. III. c. 99, s. 12, *is nevertheless to be considered, with respect to all penalties for misconduct, as a collector under that statute, and liable to no other penalty or punishment except such as is thereby imposed; by reason of* s. 51, *which exempts collectors from all penalties other than by that act, or by the acts therein recited imposed. And, therefore, where such collector committed an offence within the act, which would have been extortion at common law:* Semble, *that he could only be prosecuted for the pecuniary penalty under that act.*

Statute, 43 Geo. 3 c. 99. s. 51, 12, 62, 63, Extortion. Income Tax.

The KING *versus* DOBSON and Another.

THIS was an information against the *defendants* for extorting money under the pretence of being collectors of the income tax; which was tried at the last assizes for *York*, before CHAMBRE, J. when the *defendants* were convicted on the 3d and 4th counts, which stated as follows; "That the said *defendants* in unlawfully contriving and intending to cheat and defraud one *Arthur Price*, heretofore to wit, on the 1st day of *June* in the 44th year of the reign aforesaid, with force and arms, at the township of *Pickering*, in the county of *York*, did by colour and pretence of their, the said *defendants*, being collectors of certain duties, payable to our said lord the king under and by virtue of the said act of parliament,* unlawfully, fraudulently, and for the sake of gain and lucre, to them the said *defendants*, demand and exact of and from the said *Arthur Price*, a certain large sum of money, to wit, the sum of 5l. 5s. as and for duties payable by the said *Arthur Price*, to them the said *defendants* for the use of our lord the king under and by virtue of the said act of parliament, for a certain year then elapsed, to wit, the year ended on

* Stat. 35 *Geo. III. c.* 99.

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the 5th day of *April*, in the year of our Lord 1804, did then and there in pursuance of such demand and exaction, unlawfully, fraudulently, and for the sake of such gain and lucre as aforesaid, receive and have of and from the said *Arthur Price*, a certain promissory note for the payment of money, to wit, of the sum of 5l. 5s. and being of the value of 5l. 5s. in discharge of the said sum of money so demanded and exacted as last aforesaid; whereas in truth and fact the said sum of money so demanded and exacted as last aforesaid, was not, nor was any sum of money whatever then and there payable by the said *Arthur Price*, as and for duties to them the said *defendants*, for the use of our said lord the king, under and by virtue of the said act of parliament for the year in that behalf before mentioned; and the said *defendants* did afterwards, to wit, on the 1st day of *June*, in the 44th year aforesaid, at the township of *Pickering*, in the said county of *York*, convert and dispose of the said promissory note, and the value thereof to their own use, &c. The fourth count was very similar, charging them to have received 5l. 5s.; and there were other counts, charging them to have been collectors, and to have received the same by colour and pretence of the said office.

At the trial it appeared that the *defendants* had been appointed collectors for the year 1804, and had acted as collectors, and not having duly paid over certain monies received by them were summoned before the commissioners, but the assessment under which they were to act was not duly signed by the commissioners according to the statute 43 *Geo. III.* c. 99, s. 12. Upon this ground, HEYWOOD, Serjt. of council for the *defendants* objected that they were not duly appointed collectors, and, under the direction of the

learned judge, they were acquitted upon all the counts which charged them as collectors, and found guilty upon those by which they were charged as pretending to be collectors.

HEYWOOD, Serjt. in the last term, obtained a rule to shew cause why there should not be a new trial, or why the judgment should not be arrested, upon the ground, that there was sufficient evidence of the *defendants* acting as collectors, and that the want of signing the assessment, which was the neglect of the commissioners of the property tax could not render them subject to criminal punishment, for acting under the authority excepting as collectors; and that, taking them to be collectors, then by the statute 43 *Geo. III.* c. 99, s. 51, they were liable to a penalty of 100l.* And that by the same statute, s. 19, they are exempted from all other penalties than those imposed by the property or income tax acts, none of the clauses of which impose any further penalty.†

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* Statute 43 *Geo. III.* c. 99, s. 51, "And be it further enacted that no collector or collectors of any of the duties herein-mentioned, shall collect or gather the same by any rate or book other than such rate and book as shall be signed and allowed by such commissioners as aforesaid, or any two or more of them, and that in case any such collector or collectors shall collect the same by any other rate or book, or shall receive such duties from any person or persons not charged therewith, or shall collect from any person or persons more money than is actually charged in such rate or book, and not pay the whole money by him collected; or fraudulently alter any such rate or book, after the same hath been signed and allowed by such commissioners as aforesaid, every such collector or collectors shall for every such offence forfeit the sum of 100l."

† Section 19, "Provided always and be it further enacted, that no commissioner, assessor, or collector, who shall be

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The King against Dossow and Another.

The SOLICITOR-GENERAL, WOOD, and ABBOTT, now shewed cause. "The word *penalty* here means merely pecuniary penalty, and cannot mean all penalties; for if the *defendant* commits an offence which is indictable at common law, it would be very improper to relieve him from all penalty, excepting the forfeiture of 100l. when he might have collected by fraud a sum of 500l."

Lord ELLENBOROUGH, C. J. "The word *penalty* is capable of a construction large enough to extend to all penalties. For, acts are sometimes passed making void all penalties in certain felonies; and, in those cases, it is held, that they remove the former penalty, though it extends to death. He is amenable to the criminal jurisdiction of the country: if he offends against any part of the statute, whether the penalty is general or pecuniary."

The SOLICITOR-GENERAL. "Penalty, in common parlance, means more emphatically pecuniary penalty; and this statute means only that no popular action or other proceeding shall be instituted against him for more than the penalty of 100l.; but if he was liable to any other punishment he may be liable still at common law. This must be the intention of the legislature."

Lord ELLENBOROUGH, C. J. "We are very often arguing from the intention of the legislature, when we ought only to consider the words which the person who drew the act used, without considering

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employed in the execution of any such act or acts herein-mentioned, or of this act, shall be liable for or by reason of such execution to any penalty or penalties other than such as by this act or the said act or acts are or may be inflicted."

the extent of the words which he uses. These acts must of necessity be drawn by some one particular person, and are not the words of the legislature. We will put the best construction which we can upon the act; but yet we must put the sense which the words naturally bear, and no other."

The SOLICITOR-GENERAL. "The act must be construed as the deliberate act of the legislature itself. It could not mean to commit an absurdity, which would be most palpable, if this does not mean pecuniary penalty."

LAWRENCE, J. "Then, you must contend that they may proceed either way; either for the penalty under the act, or for some other punishment at common law. The difficulty will then be, in my mind, what cases the law was meant to apply to?"

The SOLICITOR-GENERAL. "Perhaps, I am not quite driven to that; supposing you can only proceed for this pecuniary penalty, you may proceed against a man by indictment as at common law; and then you may convict him on the indictment, and punish him by inflicting this penalty. It is true, the statute 43 *Geo. III.* ss. 62 and 63, directs how penalties shall be recovered,*

* 43 *Geo. III.* c. 99, ss. 62, 63; "One moiety of all pecuniary penalties and forfeitures imposed by this act, or any act or acts for granting duties to be assessed under the regulations of this act, may, if sued for within the space of twelve calendar months from the time of such penalties being incurred in manner herein next mentioned, be to his majesty, his heirs and successors, and the other moiety thereof, with full costs of suit, to the person or persons who shall inform or sue for the same within the time aforesaid, except where any penalty is or shall be directed to be paid to the use of the the poor of any parish; and all such penalties may be sued for in his majesty's court of *Exchequer* at *Westminster*, for offences committed in *England* or *Berwick-upon-Tweed*, or in

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but the words are "*such penalties may be sued for in his majesty's courts of record, &c. by action of debt or in-*

the courts of great sessions in *Wales*, for offences committed in *Wales*, by *action of debt or information*, wherein no essoign, wager of law, nor more than one imparlance, shall be allowed; but nevertheless, it shall be lawful for his majesty's Attorney-General, in case it shall appear to his satisfaction, that any penalty or forfeiture was incurred without intention of fraud, to stay all further proceedings in such suits or prosecutions, by entering a *noli prosequi*, or otherwise with respect as well as to the share of such penalty or forfeiture claimed by such informer or informers, as to the share thereof belonging to his majesty; provided always and be it further enacted, that any such penalty or forfeiture shall be recoverable in the name of his majesty's Attorney-General on the part of his majesty by information in the court of *Exchequer at Westminster*, and in default of prosecution within the time herein-before limited, no such penalty or forfeiture shall be afterwards recoverable in any other manner; in all which cases (except where the same is directed to be paid to the use of the poor of any parish or place) the whole of such penalty or forfeiture shall belong to his majesty, his heirs and successors, and that all penalties and forfeitures, and shares of penalties and forfeitures, incurred as aforesaid, belonging to his majesty, his heirs and successors, shall be paid into the hands of the proper Receiver-General or his deputy, to the use of his majesty; and that in all cases where the whole of such pecuniary penalty or forfeiture shall be recovered for the use of his majesty, his heirs or successors, it shall be lawful for the commissioners for the affairs of taxes to cause such reward as they shall think fit, not exceeding one moiety of such penalty or forfeiture so recovered, after deducting all charges and expences incurred in recovering the same, to be paid thereout, to or amongst any person or persons who shall appear to them entitled thereto, as informer or informers, in respect of such penalties, for forfeitures so recovered, any thing herein contained to the contrary notwithstanding."

formation;" yet notwithstanding this the offence being an offence at common law, the proceeding may be by indictment.* And although it be a new offence and the statute give a recovery by action of debt, bill, plaint, or information or otherwise, it authorizes a proceeding by way of indictment."

LAWRENCE, J. "In that case you must conclude *contra formam statuti.*"

The SOLICITOR-GENERAL. "I submit not; because it is an offence independently of the statute."

LAWRENCE, J. "But you proceed for the penalty under the statute, and your proceeding is to let in the penalty; it must, therefore, be *contra formam statuti.*"

The SOLICITOR-GENERAL. "By the statute 11 *Geo. I.* c. 30, s. 2, if any person obstruct officers of excise in the execution of a justice's warrant to search for spirits, he shall forfeit 100*l.*; and reasoning upon principle, if I proceed against him by declaration, I must declare of a plea that he render 100*l.* and must conclude *contra formam statuti*; but, if by indictment, the proceeding is not for the penalty, but upon the offence, for the punishment of it; and the court will award the fine of 100*l.*"

Lord ELLENBOROUGH, C. J. "'Penalty' means every thing whereby an act may be punished, particularly where the statute uses in other clauses the words *pecuniary penalty*, by way of distinction, and 'all penalties' must mean something more than pecuniary penalty."

The SOLICITOR-GENERAL. "In every part of this act the word *penalty* is used in the sense of pecuniary

* *Hawkins, P. C. b. 2, c. 25, s. 4.*

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penalty only, and where there is any other punishment the word *penalty* is not used.

As to the second point, these persons were not actually collectors of the rate. There was no assessment signed by the commissioners. The book never had been signed as the statute requires, and they could not be convicted on the counts charging them as collectors. They were charged as collectors in other counts and acquitted."

Lord Ellenborough, C. J. "As to that point, they are not convicted as collectors, but because they took the money under the pretence of being collectors."

Heywood, Serj. after stating the clauses of the statute, and that in *Hussey* and *Wife* v. *Moore*,* among penalties are mentioned *pœna pecuniaria*, *pœna corporalis*, *pœna exilii*, was stopped by the court.

Lord Ellenborough, C. J. "Upon considering this case, it appears to us that the conviction cannot be sustained. It is clear that 'under pretence' must import that the party was conscious that the pretence was untrue; now here it does not appear but that he thought himself a collector. If he has the burthens he must have the privileges of the office. If so, he could not be guilty upon these counts. He was a collector for the purposes of the act; they considered him so, and he considered himself so; the proper finding would have been on the first counts, stating him to be a collector."

Grose J. and Lawrence, J. of the same opinion.

Le Blanc. "It is impossible to sustain this verdict. It is taken on two counts on which the evidence is not before the court; but the 19th section of the statute

* *Cro. Jac.* 113.

holds out a protection to an officer. The commissioners who appoint the tax-collector cannot deprive him of the benefit of the appointment, by omitting any thing which may be necessary to make their appointment valid, when they themselves take the benefit of his acting."

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The KING *versus* DOBSON and Another.

RULE ABSOLUTE.

RUSHFORTH and Another, Assignees of RUSHFORTH *against* HADFIELD and Others.—8th *Feb.*

Carrier. Liens. Usage of Trade.

Semble. *The courts lean very strongly against the establishment of a* lien *for a general balance by carriers, as a usage of trade; and where many witnesses were called from distant parts of the country to prove it, and there was no evidence on the other side, and the jury found against the general lien; the verdict was held to be not against evidence; for it did not clearly fix the party with the knowledge of such usage.*

RUSHFORTH and Another *versus* HADFIELD and Others.

THIS was an action of *trover* brought by the assignees of the bankrupt to recover the value of a parcel of goods sent by the *bankrupt* from his warehouse at *London*, to his warehouse at *Halifax* in *Yorkshire*, by the waggon of the *defendants*, and which they had detained for their general balance, for money due for the carrying of goods. The cause had been tried before, and there was a verdict for the *defendants* which was set aside, and a new trial granted, upon the ground of a misdirection by the learned judge.* At the second trial at the last assizes for *York*, the *plaintiffs* gave evidence of the property, and the *defendants* entered into evidence of a general usage by carriers to detain goods for a general balance; and several carriers from different parts of the country were called to prove

* Vide 2 *Smith's Reports*, 634.

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such practice. The *defendants* had detained goods of a person in 1799 for a general balance, on which an action was brought, but it was decided upon another point; and also in 1800, they had detained goods upon a general insolvency of one of their employers, who paid the money. The learned judge left the whole case to the jury, to decide whether the usage proved was so general as to warrant the conclusion, that the bankrupt knew it and contracted with the *defendants* upon the terms of stopping for a general balance. If they were of that opinion, they were to find for the *defendants;* if not, the general rule of law was to prevail, that a carrier had not a lien for a general balance.

At the trial it was much argued by the counsel for the *plaintiffs*, that the evidence of carrriers from distant places and of the usage of their trade could not apply, to affect the *plaintiffs* or the bankrupt with including a similar usage in the contract with the *defendants*, for it could not be within his, the bankrupt's, knowledge.

A rule having been obtained, to shew cause why there should not be a new trial, on the ground that the verdict for the *plaintiffs* was against evidence,

PARK and WOOD, for the *defendants*, contended that the evidence of the usage of the trade was very complete, and extended back for 30 years, and was all on one side, for the *plaintiffs* called no witnesses and produced no evidence to shew a contrary usage.

COCKELL, Serj. *contrà*, relied upon the finding of the jury.*

* It is not usual to report cases which turn merely upon the balance of the evidence; but in this case the observations of the court illustrate some very general principles.

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RUSHWORTH and Another versus HADFIELD and Others.

Lord ELLENBOROUGH, C. J. "I cannot say, that there has been a general acquiescence in the usage set up, for 30 years. There has been a stoppage in a particular instance in 1775, and one also in 1786; but all the rest are after the year 1799, and after the case of *Aspinal* v. *Pickford*.* The question is here merely what is the contract of the parties; and as the parties are silent, that contract will be according to the particular dealings with the individuals themselves, or the general dealings of other persons in the same business. In most of the instances of stoppage, there is something of an inequality between the parties, and a composition rather than a regular usage; for if the consignor of the goods is a bankrupt, and the consignee is solvent, the consignee will be very glad to pay a balance for carriage of goods, if the particular parcel is of large value. This therefore is not like the evidence which generally occurs of usages of trade, where all the parties are in circumstances wholly indifferent and act independently. Here there are not any instances of stoppage for a general lien before the year 1775. It is true, that, if it applied to the parties generally and fairly, and indifferently, that might be time enough. As between the particular parties, the carriers in this case, they are confined to much later times, and most of them are under particular circumstances; and many of the instances being with carriers at distant places, it was a fair question to put to the jury, whether the parties here knew of them, or, knowing of them, did or did not incorporate their usage into the contract. I think the subject of *liens* is one which ought to be regarded with great jealousy. Every tradesman is contending for a general lien, and farriers may as well set up a general lien as carriers; and then, if a horse is sent to be shod the

* *Bos.* and *Pull.* 4½, (*n*), in which case a jury found for the usage.

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horse will be detained because the groom has not sufficient in his pocket to pay his master's general balance. In this case, and all similar ones, there can be no inconvenience to the parties; for, if they want to have a general lien, they may have it by making a particular agreement with their customers; but, in this case the jury have done right in saying that this general evidence does not establish the lien by the usage of trade."

GROSE, J, "The direction of the learned judge in this case was right; there must be a fair and reasonable presumption, from the evidence, that the *plaintiffs* knew they were dealing subject to this usage of trade; otherwise, all juries in every part of the kingdom must find the same way. For such evidence, of the usage of carriers at distant parts, might easily be produced, and the law of liens with respect to common carriers, would be wholly changed by indirect means."

LAWRENCE, J. "There was evidence left to the jury for them to have found the other way; and as it is a dealing with common carriers, we need not be very solicitous about the establishing the lien; for the labour done in respect of each parcel gives them a *lien* for the particular carriage, and they may say to their employers that they will not carry any other parcels or deliver out any particular parcel, unless they will permit them to have a lien for a general balance upon the next parcel. I am not for permitting tradesmen of all descriptions to alter the law of the land by proving all sorts of customs, which are to alter the common law. We ought to look for the law in our law books, and not to say in such a case it was found a custom of the trade, and in such a case it was not found a custom of the trade. It does not seem to me, that the convenience of the carriers' trade requires it, and I shall not be at all sorry, if it is

generally understood, that they are not entitled to it."

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LE BLANC, J. "This is a case in which the jury ought to require very strong evidence in support of the *lien*; and there is not much weight in the argument that the evidence was all on one side, for the general right was on the other. Whatever the weight of that evidence was, it might have been fortified by much stronger evidence in the opinion of the jury, to have fixed the *plaintiffs* with the knowledge of such a usage of trade."

RULE DISCHARGED.

LUNDIE *against* ROBERTSON.—10th *Feb.*

Where the indorser of a bill of exchange, upon being called upon for payment by a subsequent indorsee, on failure of the drawee, *said that he had no notice, but it was a just debt, and he would pay it; and offered a bill on* London *at two months; held that this promise was a sufficient admission of the due presentment, and a waiver of the want of notice, and not a conditional promise, upon which it was necessary to declare specially.*

Bill of Exchange. Evidence. Proof of Notice of non-payment.

THIS was an action upon a bill of exchange, which had come to the *defendant* by indorsement, and was afterwards indorsed by him to the *plaintiff*. At the trial at the last assizes at *Newcastle*, before CHAMBRE, J. the *plaintiff* proved the indorsement, and also, that some time after the bill became due the *defendant* upon being asked for the money, said, if the witness would call in a day or two and bring the account* he would pay him; and when the witness called again, he offered to give a bill on *London* for two months; but he said also that he had not regular notice, but it was a just debt, and he would pay it. The declaration contained the usual

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* The account meant, was an account of the expences attending the return of the bill, and of a letter written to the *defendant* and an affidavit of debt made.

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averment that the bill was presented for payment when due, that it was refused, and that the *defendant* had notice thereof. WILLIAMS, counsel for the *defendant*, objected that there was no evidence of the presentment, and that as the *defendant* was not bound to pay if he had not had notice, of which his assertion was now made evidence, he had a right also to make conditions as to the nature of the payment which he would assent to, and having promised to pay only by giving a bill at two months upon *London*, the *declaration* should have been framed in special *assumpsit* upon that promise. The learned judge thought that the promise to pay was a sufficient admission of the due presentment, and that the promises need not be stated in the declaration, and overruled the objection, and there was a verdict for the *plaintiff*. And a rule having been obtained in the last term to shew cause why that verdict should not be set aside, and a nonsuit entered,

LITTLEDALE, shewed cause. "There were two objections taken at the trial; *first*, that there was no regular notice; and *secondly*, that there was no evidence of the presentment. As to the fact that there was no notice, the *defendant* himself saw the bill in the *plaintiff*'s hands three months after it was due. In *Blesshard* v. *Hurst*,* and in *Goodall* v. *Dolley*,† the parties were ignorant of the time of the presentment; but it was admitted, that if the person was acquainted with the true circumstances he would be bound by the promise. Here he knew that the bill had not been paid; and if there was any doubt of the timely notice, the *defendant* waives it by saying, 'I have not had due notice, but as the debt is a just one I will pay it.' The time for notice must depend upon circumstances. In some cases it may be

* 5 *Burr.* 2670. † 1 *T. Rep.* 712.

given immediately, in others within a week, in others a month, or more, according to the number of bands which the bill is to go through. There was indeed not any direct evidence given of the presentment on the day; but that may either be proved by the *plaintiff*, substantively, by positive evidence, or the *defendant* may as in this case, make such admissions as may render the direct proof unnecessary. And it would be very hard if a *plaintiff* were not to be relieved from such proof by the admission of the *defendant*, because it may often happen that the presentment was made by himself."

WILLIAMS, *contrà*. "The question is, whether the promise which is now relied upon was made under the ignorance of any material fact? Now the knowledge of the *plaintiffs* having the bill in his hands at the time of making the promise, does not afford any inference whether it was duly presented or not. Here is not sufficient evidence of the positive averment in the declaration that the bill was duly presented when due, and if the *plaintiff* recovers upon this evidence he supports his case not by positive evidence of his own, but by the *defendant*'s inability to meet by positive evidence the positive averments in the declaration. A promise to pay is good evidence to shew that a man has agreed to pay for goods sold and delivered; because it is clear that he must know whether he received the goods or not, and upon the form of the *count*, there does not appear to be any omission in the proof; but here is a formal and direct allegation, that the bill was presented for payment when it became due, which is wholly omitted and overlooked in the proof. The *plaintiff* cannot now resort to the other counts in the declaration, for no evidence was given on those counts, but only upon the bill. In order to make the promise to pay available, it must be esta-

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blished that the promise restored the *plaintiff* to his right of suing, and also supplied proofs; but the promise to pay can only amount to the giving the *plaintiff* a right to sue upon that promise, and therefore it ought to be specially stated."

Lord ELLENBOROUGH, C. J. "As to the supplying of proof, there needs no proof by the one party of that which is admitted by the other. In this case there cannot be any doubt. Here is a person, the indorser of a bill, who upon being asked for the money says, he has not had proper notice but it is a just debt and he will pay. It is for the convenience of mankind and the necessary facilitation of the business in courts of justice, that where a man promises to pay, every thing shall be presumed to be *rite actum*. It must therefore be presumed, that it *was* presented and that he had notice. Here the objection which he makes points only to the notice, and his former objection was only obviated by that admission of the debt and promise to pay, but he does not deny that there was a proper presentment; he even goes farther, he waves the objection as to the notice and promises to pay. This is not so much a waiver of the want of presentment as an admission that there existed in that respect no objection. As to the promise of a bill of exchange, that comes to nothing, the want of notice being waived, it comes to the first objection."

RULE DISCHARGED.

ROE, on the Demise of EDWARD CHILD, and MARY his Wife, *against* WRIGHT. 1806.

A devise of all my estate, lands, &c. called the Coal Yard, *in the parish of* A. *held to pass the fee, otherwise the devise of the estate would be only the same as a devise of the lands, and it may be read* 'all my estate in lands,' *&c.* Devise. Estate. Fee, or for life.

ROE dem. CHILD *versus* WRIGHT.

THIS was an *ejectment* brought to recover the possession of certain houses, and premises, called the *Coal Yard*, in the parish of *St. Giles's*, in the county of *Middlesex*, the demise being laid on the 2d of *June*, 1805. The cause was tried before Lord *Ellenborough*, at the sittings for *Middlesex*, after last *Michaelmas* term; and a verdict was entered for the *plaintiff*, subject to the opinion of the court on the following case: *James Camper*, now deceased, being in his lifetime, and at the date of his will, seised in fee of the premises in question; and also seised and possessed of other freehold, copyhold, and leasehold estates in *Essex*, *Middlesex*, and *Huntingdonshire*, by his will dated 28th *January*, 1763, and duly executed to pass real estates, devised in the following manner. "And as touching such worldly and personal estates wherewith it hath pleased God to bless me, in this life, I give, devise, and dispose of the same in the following manner: *Imprimis;* I give and devise unto my loving wife *Sarah Camper*, all my lands, houses, &c. freehold, copyhold, and leasehold, whatsoever and wheresoever, and to receive the rents and profits thereof during her natural life, and also all my deeds, mortgages, bonds, and writings, and also all my stock, goods, chattels, effects, and personal estate, whatsoever and wheresoever, she paying thereout the legacies hereinafter given and disposed of; and I do hereby nominate

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and appoint my loving wife *Sarah Camper*, to be sole executrix of this my will; and after her natural life, my mind and will is, and I do hereby order, direct, give, devise, and bequeath, all my lands, houses, &c. freehold, copyhold, and leasehold, in manner following; I give and devise unto my grandson *James Wright*, all my lands, freehold, copyhold, and leasehold, in the county of *Essex*, (except herein excepted and reserved, the house I now live in with all the lands, yards, outhouses, stables, and all other conveniences and appurtenances thereunto belonging, to be hereinafter disposed of,) also I give and devise unto my grandson *James Wright*, all my estate, freehold, and copyhold, lying and being in the town of *Ellington*, in *Huntingdonshire*. And also I give, devise, and bequeath unto my grandson *John Wright*, all my estate, lands, &c. known and called by the name of the *Coal Yard* in the parish of *St. Giles's*, *London*. Also, I give unto my grandson *John Wright*, the sum of 500l. to be paid in six months after my decease; also I give and devise unto my grandson *James Camper*, the house I now live in, with all the lands, yards, outhouses, and all the appurtenances belonging to the same, and also all my houses and lands, commonly called and known by the name of *Castle Yard*, in *Holborn*, *London*, and now in the tenure or occupation, of *George Oldmixan*, Esq. also I give and devise unto my grandson *James Camper*, 500l. to be paid when he shall attain his age of twenty-one years." The said testator departed this life on the 30th day of *January*, 1763, without having altered or revoked his said will, leaving *Sarah Camper* his widow, and his three grandsons, the said *James Wright*, *John Wright*, and *James Camper*, named in his said will surviving, and the said *James Camper*, was also his heir at law. Upon the death of the testator the said *Sarah Camper* his widow entered into, and continued in possession of the premises in question, to-

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gether with the other property devised to her by the said testator during her life. Upon her death, the said *John Wright* entered into possession of the said houses and premises, called the *Coal Yard*, in the parish of *St. Giles's, Middlesex*, and continued in such possession until the month of *May*, 1805, when he died, leaving the *defendant, James Camper Wright*, his heir at law, who on the death of the said *John Wright*, took possession of the premises, and held them at the time of the demise and ejectment. *James Camper*, the testator's grandson and heir at law, departed this life in the year 1768, intestate as to the premises in question, leaving *Mary* the wife of *Edward Child*, (one of the lessors of the *plaintiff*,) his only child and heir at law, and also the heir at law of the said testator. The question for the opinion of the court is, whether the lessors of the *plaintiff* are intitled to recover. If the court shall determine that they are so intitled, the verdict is to stand, if otherwise a nonsuit is to be entered.

MARRYAT, for the *plaintiff*. "The testator had no land in the parish of *St. Giles's, London*, the parish of St. *Giles's*, in which his house lay, being situated in *Middlesex;* and the question is whether by the devise to *John Wright* of "all his estate, lands, &c. known and called by the name of the *Coal Yard*, in the parish of *St. Giles's, London*," the devisee took an estate in fee, or for life only? In the first case the lessors of the *plaintiff* are entitled to the reversion, there being no residuary devise, although there are general words in the introduction to the will, in some measure indicative of an intention to devise all the testator's estates. First, he commences by declaring that intention "as touching such worldly and personal estate wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in manner following,"

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dren as he shall think convenient, &c. concerning the meaning of which there could scarcely be a doubt. In *Bailis* v. *Grey*, if the testator purchased an estate of inheritance of *M.* that clearly falls within the description. But where the words were all my estate at *Kirby Hall*, near *Henningham Castle*, which is of 135*l.* a year, the description was held to be applied to the devise of the reversion, and not to the estate in the reversion. In *Fletcher* v. *Smiton*,* the words were 'all the rest of my estates;' and in *Tanner* v. *Wise*, there was a devise of all the rest of the testator's estate."

Curia adv. vult.

And now the opinion of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. *after stating the case*, "The question is, whether, under these words in a will, 'I give unto my grandson *John Wright*, all my estate, lands, &c. known and called by the name of the *Coal Yard* in the parish of St. *Giles's*, *London*, the devisee took an estate in fee or an estate for life. The lessor of the *plaintiff* who claims as heir at law of the testator, contends that he takes an estate for life only. It is admitted by the counsel for the *plaintiff*, that the words 'all my estate' in a will, comprehend not only the lands but the estate therein, unless restrained by other words; but he contends that the word 'estate' is restrained by the words with which it is here immediately connected. And that the words 'lands, &c. known and called by the name of the *Coal Yard* in the parish of St. *Giles's*, *London*,' immediately following are to be construed as descriptive of the local situation of the estate demised, and to restrain the general effect of the word estate. That then the word estate has no

* 2 *Term Rep.* 656.

other effect, than the words 'lands called and known by the name of *Castle Yard* in *Holborn*,' in another part of the will, according to the decision in the case of *Doe* d. *Child* v. *Wright*.* The general effect of the words 'all my estate,' however they were coupled with others limiting them in point of place, as 'at or *in* a certain place' has been universally admitted in the cases cited for the *defendant*, and has been often decided, as in the case of the Countess of *Bridgwater* v. the Duke of *Bolton*,† and also in *Holdfast* d. *Cowper* v. *Martin* and Another,‡ which last case with the exception of the residuary clause, coincides with this case nearly in term. It is unnecessary to add any observation therefore, upon them and considering the meaning of the words 'all my estate' in the language of Mr. Justice *Buller* in *Holdfast* v. *Martin*, so general 'that so far from its being necessary to add words of inheritance to it, in order to make it pass a fee, words of restraint must be added in order to make it carry a less estate, the question turns solely on whether the words 'lands, &c. called the *Coal Yard*,' &c. render it only descriptive of the locality. It is tantamount to 'all my estate *in* lands, &c. called,' &c. and between the words in this case, and in the case of *Barry* v. *Edgeworth*,§ 'all her land and estate in *Upper Catesby*;' which were held to pass the fee, there is no material difference. If not, the words estate and lands, must be made to mean the same thing, as the word 'lands' only in order to defeat the effect of the word 'estate,' whereas according to the construction for the *defendant*, all the words will have their proper meaning. If not restrained by the words *lands*, &c. then the question is whether it is restrained by words 'called and known,' &c.? But that is the same as if it were 'all my estate in the lands

* 3 *Bos.* and *Pul.* 335, and 8 *Term Rep.* 64. † 6 *Mod.* 106, and 1 *Salk.* 236. ‡ 1 *Term Rep.* 411. § 2 *P. Wms.* 524.

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called the *Coal Yard,*' and passes the fee, and this is going no further than where the devise was 'all my estate in *Kirby Hall,*' on which Lord *Hardwicke* observed that it passed not only the land, but the interest in it besides, for though here is a locality, *Kirby Hall,* yet the testator meant the interest in it too; for suppose, and I believe it has happened, that a man were to devise all his real estate in *England,* here is a locality, and yet none will say that the interest does not pass as well as the estate. And if the locality applied to *Kirby Hall,* yet in *Goodwyn* v. *Goodwyn,** Lord *Hardwicke* said, that a devise of all the testator's estate in *A.* would carry a fee. And in this sense, giving effect to all the words this may be understood; and we shall be effectuating the intent of the testator, who probably meant in this case as testators usually do, to give an estate in fee, where the devise is general and without words of limitation."

JUDGMENT for the DEFENDANT.

DOE on the demise of EVERETT, and others *against* COOKE and others.—11th Feb.

Devise. Condition.

A. devised a term to C. for life, and, after his decease, to his child or children, and their executors, &c. but upon condition that, in case he should die an infant unmarried and without issue, then the devise should go over to D. &c. C. survived 21, married and died without issue; held, that the condition must be read as entire, and the devise over to D. was void.

Doe dem. Everett *versus* Cooke.

THIS was an ejectment for lands in the parish of *Butleigh,* in the county of *Somerset,* on the several demises of *W. Everett, Mary Mears,* and *Jane Cooke,* all laid on 10th of *April,* 1805. The *defendants, John Cooke* and *Stephen Cooms,* and *Rebecca* his wife, pleaded *not guilty.* The cause was tried before the honourable Mr. *Baron Graham,* at the summer assizes at

* *Vesey,* 228.

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Bridgwater, 1805, when a verdict was found for the *plaintiffs*, damages one shilling, costs forty shillings, subject to the opinion of the court upon the following case:—*Thomas Browning* being possessed of a *leasehold* interest in the premises in question, for a long term of years, still unexpired, on the 17th of *January*, 1760, made his will, and thereby amongst other things devised the premises in question, as follows, "also I give, devise, and bequeath the use and occupation of a dwelling-house and out-houses, lying in *Butleigh* aforesaid, with a close of pasture ground to the said dwelling-house adjoining and belonging, called *Kelways*, with the rents, issues, and profits thereof, to *Thomas Cooke*, son of *William Cooke*, of *Butleigh*, aforesaid, husbandman, by *Eliz.* his late wife, deceased, to hold to him the said *Thomas Cooke* and his assigns, (from and immediately after the death of the said *Susannah Kelway*, widow, or the day of her marriage again to any other husband, which shall first happen) for and during the term of his natural life; and, after his decease, I give and devise the same to the child or children of the said *T. Cooke* to be begotten by him on the body of any woman or women that he shall hereafter intermarry with, his, her, and their executors, and administrators, and assigns for ever. But my will is upon this further condition, that in case the said *Thomas Cooke* shall die an infant, unmarried, and without issue, then I do hereby give, devise, and bequeath the said dwelling-house, outhouses and close of pasture thereunto adjoining, with the appurtenances unto the said *William Cooke*, and his three children by the said *Eliz. Cooke*, his late wife, deceased, share and share alike, (as tenants in common, and not as joint-tenants, his her and their heirs, executors, administrators, and assigns, for ever." *Thomas Browning* died shortly after, not having revoked or altered his will. *Susannah Kelway* mentioned in the will, died soon after the testator. *Thomas Cooke* entered on the premises in

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question, and afterwards married *Jane Buyafield* one of the lessors of the *plaintiff*, held the premises in question to his death, and died in *February*, 1802, never having had any issue and being about 46 years old. *William Cooke* named in the will, the father of *Thomas*, and of the *defendants*, *John Cooke* and *Rebecca Cooms*, the *defendants*, are two of the three children of the said *W. Cooke* by *Eliz.* his late, then wife mentioned in the will, and are in possession of the premises in question; the other was *Mary Callow*, who has been dead some time. The lessors of the *plaintiffs* claim under *Thomas Browning*'s will, and are entitled to the premises in question if the limitation to *W. Cooke* and his three children by *Eliz. Cooke*, is void under the facts stated. The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover; if so the verdict is to stand; if not a nonsuit is to be entered.

PELL, for the *plaintiff*. "The question is, whether the limitation over to *W. Cooke* and his three children by *Eliz. Cooke* is void, *Thomas Cooke* having lived beyond the age of 21, and having married and then died without issue? In the construction of the will, the court will give effect to as many words in it as can fairly stand together, and the limitation cannot now take effect, because only one of the contingencies on which it was to vest has taken place, namely, the dying without issue: whereas the condition expressed in the will is entire, and consists of three parts united, namely the dying an infant, dying unmarried, and dying without issue, and the estate does not go over to *W. Cooke*, unless *Thomas Cooke* happens to die under age as well as unmarried, and without issue. In this construction all the words used by the testator are comprehended in the condition, and have a clear meaning; but, in the construction favourable to the *defendants*, some of the words must be omitted and

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others changed; as *and* must be read *or*. Thus in *Barker* v. *Suretees*,* where there was a devise to one in fee, but in case he dies before he attains the age of 21 years *or* marriage, and without issue, then to go over, it was held that the attaining 21 was a performance of the condition, and that upon the authority of *Price* v. *Hunt*,† *where or* was construed conjunctively, it might be read, as if it were 'and if he dies before 21 unmarried, and without issue:" which he did not do, for one of the circumstances failed. And in *Framlingham* v. *Brand*,‡ a devise 'to R. and his heirs, and in case he shall happen to die *in his minority* and *unmarried, or without issue*, then over,' it was held that the estate was to go over upon one contingency, the dying under age of which the other two contingencies were only a qualification. If it were not so, there would be nothing to qualify the contingency, 'if he dies without issue;' and it would mean a dying without issue generally: but, by making it a qualification of the first contingency, it reduces it to a certainty, that by the word 'issue' is meant issue of the body, a dying without issue within the rules of law and which creates an estate-tail. *Bigge* v. *Bensley*,§ *Forth* v. *Chapman*,‖ *Target* v. *Gaunt*."¶

Lord Ellenborough, C. J. "There you read the words if he shall die an infant unmarried and without issue, as if it were, if he shall die an unmarried infant and without issue."

And *Porter* v. *Bradley*,** being cited by Pell,

Lawrence, J. said "Lord *Kenyon* must have been misunderstood, if he is supposed to have said that *Forth* v. *Chapman* was not law."

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*2 *Str.* 1175. † *Pollex.* 645. ‡ 3 *Atk.* 390, 1 *Wils.* 140, *s. c.* § 1 *Bro. C. C.* 187. ‖ 1 *P. Will.* 663. ¶ *Ibid.* 432. ** 3 *Term Rep.* 143.

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Dampier, *contrà.* "The word *issue,* though it be a word of indefinite extent, cannot prejudice the condition, because the issue would have taken under the first devise, and it must clearly be confined to issue at the time of his decease. In all the cases where *or* is read *and* there has been a devise to the first taker in fee, and the words were intended to give a limitation to that devise, and to destroy the estate devised by the former words. In this case *W. Cooke* had four children, all of whom were infants, namely, *Thomas Cooke* and three others. He devises to *Thomas Cooke* for life, with remainder over to his children, and then devises to the three other children, and to *W. Cooke,* and it is clear that he did not mean that this estate should sink into the residue while there were any children remaining of *W. Cooke.* For he has not given an absolute estate to *T. Cooke,* but only an estate for life, and then if this sinks into the residue, if he dies without children of his body, it must sink, although there are children of *W. Cooke* living, who it was clearly intended by the testator, should take in case of *Thomas Cooke*'s death without issue. The construction which the *plaintiff* contends for strikes out the words *unmarried* and *without issue* from the condition, at least it strikes out the words *without issue;* for he could have no issue unless he was married. But it will be altogether sensible and pertinent if it be read thus, 'in case *Thomas Cooke* dies an infant, or dies unmarried, or, being married, dies without issue, then to go over to *W. Cooke.* A similar construction was had in *Goshawke* v. *Chiggell,** where one devised a term to H. his daughter *habendum* to himself and wife for their lives, and after their decease to the said H. and if she hath heir of her body, then to her assigns; provided that if she died unmarried having

* *Cro. Car.* 154, Sir *W. Jones,* 205.

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no issue of her body lawfully begotten then the grant to her should be void: and D. should have the term: and it was held, that the proviso should have this construction, that if she die unmarried or married having no issue of her body (for she may not have lawful issue unless she be married) then it shall be void.' And in *Woodward* v. *Glasbrooke*,* where A. devised land to his several children in tail, and if any of them should die *before* 21, *or unmarried*, such child's part to go to the survivor, it was held that it should go over where one arrived at 21 and died unmarried."

PELL, in reply, contended, that wherever it might be necessary in order to make the text of the will consistent with the intent, it was immaterial whether some words were changed or not, as in *Framlingham* v. *Brand*. And he said that it might possibly be the intent of the testator by this condition and by introducing the word *unmarried*, to allow *T. Cooke* to make some provision for his wife and children.

LAWRENCE, J. "He could not mean to do that, because if he married and had children, whatsoever settlement he made for the wife would have been void, for the children would have taken after his death."

PELL then cited *Bull* v. *Coleman*;† and *Doe* d. *Davy*, v. *Burnall*,‡ to shew that the words *die without issue* in this case would be held to be a dying without issue generally.

Cur. adv. vult.

And on this day the judgment of the court was delivered to the effect following, by

Lord ELLENBOROUGH, C. J. After stating the

* 2 *Vernor*, 338. † 2 *Vern.* 670, and 1 *P. Will.* 142.
‡ 6 *T. Rep.* 30.

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case. "On reading this will, although there may be perhaps some reason to think that the testator meant that in case *T. Cooke* died without leaving any children, the estate should go over to *W. Cooke* and his three children, yet we do not think we ought to give that effect to it, considering the words which have been used. For if such had been really his intent, nothing would have been easier than to have expressed it clearly; as for instance he might have said, 'my will is that in case the said *W. Cooke* shall die an infant, or shall die unmarried, or without issue living at the time of his decease, then I give the same to *W. Cooke* and his three children.' Now in order to support this construction we must reject the words *infant and unmarried* altogether, or if we suffer those words to remain, we must insert the word *or* between the other articles of the condition, and read it 'if he shall die an infant or unmarried or without issue.' But this would leave it upon any one single event, as his dying unmarried; for unless he were married he could have no lawful issue. That mode of reading the will would defeat the limitation, if he died unmarried at any time, and that difficulty occurs whether it be construed in case he die an infant unmarried, or be unmarried and of age at the time of his death. And if we convert the word *and* into *or*, and it is to apply to each part of the sentence, making all the branches of the condition in the disjunctive, then according to the rule, *in disjunctivis sufficit alteram partem esse veram*, it would have gone over, in case he died an infant, to the prejudice of his children if he had any. But the most reasonable construction seems to be as in *Framlingham* v. *Brand*,* that it is one contingency on the event of his dying an infant, attended with two qualifications, his dying unmarried or married without any children. He, the testator, might have intended that

* 3 *Atk.* 309.

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if he died an infant married and without children, his wife might be entitled to a distributive share, or that he might make a devise in her favour, still preferring his children to her, if he left any. That is, if he died under age without wife or children, that it should go to *W. Cooke*, but that if he survived 21, he might dispose of it at all events. In putting this construction upon the will, it would stand as if the devise were to *W. Cooke* for life, and in case he die an infant unmarried, then over to *W. Cooke* and his children, but if he, *Thomas Cooke*, have any children, then I give the same to his children." His lordship made a few further observations in confirmation of this construction, and concluded that there must be

JUDGMENT for the PLAINTIFF.

DALE (qui tam) *against* BEER.—*Feb.* 12.

A plea in an action qui tam, *not entitled* qui tam, *nor describing the* plaintiff *as suing* qui tam, *is not such a* nullity *as that the* plaintiff *can sign judgment as for want of a plea, if there be not some other cause for misleading the* plaintiff *as to the real action in which the plea is pleaded.*

Practice. Plea, title of

Dale (qui tam) versus Beer.

THIS was a rule to shew cause why the judgment should not be set aside for irregularity. The judgment was signed as for want of a *plea*. The declaration was entitled *Thomas Dale* (*qui tam*) v. *Walter Beer;* but the plea was entitled only as in a cause, *Walter Beer* at the suit of *Thomas Dale*. The *plaintiff* treated this as a nullity, and signed judgment as for want of a plea. It was neither stated *qui tam* in the margin nor in the commencement of the plea, which was in the ordinary form. "And the said *Walter* comes and defends, &c. and says that he doth not owe the said sum of l. as the said *Thomas* hath above thereof complained against him."

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DALE (qui tam) versus BEBB.

READER, in support of the rule, contended, that it was not necessary that the special character of the *plaintiff* should be stated in the title to the plea. It would not be necessary to state that a man sued as executor. The christian names of both parties appeared upon the plea, and there was no other cause between the same parties.

LAWES, *contrà*, contended, that it was not a plea in the cause: that if it were a plea in abatement, no perjury could be assigned upon the affidavit in support of it.

Lord ELLENBOROUGH, C. J. "There is no rule of the court that a plea should be so entitled. Then the question is, whether there is sufficient certainty for the *plaintiff* to know that it is a plea in his cause. Now this is an action of debt and must be for a particular sum. I do not know that it is necessary that he should state that the *plaintiff* sues *qui tam*, he is the person who himself sues, and all that addition of circumstance is only what he states to entitle himself to sue."

RULE ABSOLUTE.

WELD *against* HORNBY—*Feb.* 10*th.*

Wear. Fishery. Nuisance. River.

Semble. *A prescription or grant of a fishery cannot authorise the erecting of a wear entirely across a public river, whereby the passage of all fish shall be prevented; for that is* prima facie *a public nuisance.*

WELD versus HORNBY.

THIS was an action upon the case against the *defendant* for disturbance of the *plaintiff* in his fishery in the river *Ribble* and the river *Hodder*, to which the *defendant* pleaded the *general issue*. At the trial at the last *Lancaster* assizes, before SUTTON,

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B. the *plaintiff* proved his right of fishery, by general usage, in the river, and that the *defendant* had erected a wear below the salmon fishery of the *plaintiff*, whereby all the fish were prevented from coming up the river from the sea. The *defendant* set up a grant in the reign of King *James I.* of a water corn-mill, and the liberty of taking in all seasons the salmon in the river, and all other fish; with a right to a wear across the river, which was not limited in terms as to height or breadth, and it appeared that anciently he and his predecessors had been possessed of a common brush-wood wear, which extended all across the river; but which was so constructed, that, although it prevented the large fish from passing up the river, yet a great many fish insinuated themselves through the interstices of the brush-wood and passed up. In the year 1766, this brush-wood wear was in part removed, and a stone wear was erected extending across two thirds the width of the river, the rest being composed of brush-wood as before; and in 1784, this stone-wear was continued entirely across the river, and a complete trap was constructed to catch all the fish, so that none could pass up the river, except by the opening of the trap at the pleasure of the *defendant*. It appeared that the stone-wear was not higher than the ancient-wear. The *plaintiff*'s action was brought in 1804, after about 19 years' possession by the *defendant*. The learned judge upon this possession, left it to the jury to say whether the *plaintiff* was prejudiced in his fishery by what the *defendant* had done; and secondly, if they thought so, whether the *defendant* had not a right to do it under the old grants. For as there was a stone-wear over half the river in 1766, it was too late to dispute that. The jury found that what was last built was not higher than that built in 1766, and that it must now be taken not to be higher than it ought to be; upon which ground they found a verdict for the

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defendant, although they thought that what the *defendant* had done was an injury to the *plaintiff*, yet they thought he had a right to do it from the usage and possession.

COCKELL, Serj. for the *plaintiff,* obtained a rule to shew cause why there should not be a new trial, and contended, that the *plaintiff*'s right was not barred by the *defendant*'s possession; because until the year 1784, the *plaintiff* had no right of action against the *defendant,* the fish passing up the river during the continuance of the wear, consisting partly of stone and partly of brush-wood, with as much facility as they did before, through the ancient wear of brushwood. The injury therefore commenced in 1784, and 20 years not having elapsed before the bringing of the action, he was not barred by the length of the *defendant*'s possession, and the period of his submission to it.

TOPPING, was heard *contrà,* and the whole of their controversy consisted in arguing upon the evidence and the model of the wear and the trap, whether or not the *plaintiff*'s fishery was injured more by the present wear than by the former one of stone and brushwood. And for the *plaintiff*, the stat. 2 *H. VI.* c. 17, was cited, which enacts that no person may fasten nets across rivers to disturb fish, and disturb the passage of vessels on pain of forfeiting 5l.

Lord ELLENBOROUGH, C. J. "On this subject the legislature has always evinced a proper jealousy for the rights and interests of the subjects in general. In the stat. 1 *Geo. I.* c. 18,* all persons are forbidden from setting any thing across the river whereby the salmon may be hindered from passing up to spawn, and by *Magna Charta,*† all the wears form the time to

* This is altered as to the river *Ribble* by stat. 23 *Geo. II.* c. 16.
† s. 14. ‡ *Artic.* 39.

come shall be destroyed in the rivers of *Thames* and *Medway*, and throughout all *England*, except upon the sea-coast. And I believe there does not exist in *Great Britain*, a single undisputed wear, in any river built entirely across the river. In a case which I happen to know, and which occurred with respect to a river between *England* and *Scotland*, it was not permitted to be contended for, until there was some compromise by which the parties were satisfied. I happen also to know from my attendance in another place, that the laws of *Scotland* which are pretty full upon this subject, correspond nearly with the article in *Magna Charta*. At the *Eden* where the corporation of *Carlisle* and Lord *Lonsdale* have *stells* for the catching of fish, it was held that the keeping of them close day and night was a public nuisance; and Lord *Kenyon* said, no man can claim an estate in a public nuisance. When *Buller*, J. came to try that cause, he admitted evidence of usage however, thinking, that under certain restrictions these *stells* might be allowed by usage. There is much legal learning upon the subject of fishery in Mr. *Hargrave's* notes to Lord *Coke's First Institute*, 122, (a. n. 7). And Lord *Coke* himself says, these grants of fishery must be taken and may be good *super possessionem et usum*; and that is the true way of taking it, for as to the meaning of these old charters and deeds they must be explained by the usage and the nature of the possession. Here it was clear, that within twenty years the public had always a right to the escape of some of the fish; but since that time, the *defendant* puts up a stubborn erection of stone which wholly precludes the passage of all fish. The brushwood wear necessarily lets a part of the fish through, and a fish is an animal which readily insinuates itself through a very small aperture, but this wear wholly stops the passage of all the fish."

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Welb versus Hornby.

LAWRENCE, J. "It is clear that, at first the *defendant* claimed a right to part, and now he claims a right to the whole of the fish, and the jury have found that the erection of the stone wear was an injury to the *plaintiff*, who is not barred by the length of possession.

RULE ABSOLUTE.

STEAD *against* GAMBLE—11*th February*

A plaintiff having declared in trespass in a certain close for pulling up and burning 40 *perches of hedge there standing and being, the* defendant *pleaded the general issue, and also a special plea that the hedge was erected on a common where he had right of common, and justified abating the same as a nuisance thereto; and the jury found for the* defendant *on the special plea, and for the* plaintiff, *damages* 20*s. on the general issue; held, that the* plaintiff *could not have full costs; the action being trespass,* quare clausum fregit, *in which the title to the land might have come in question, and the judge not having certified, the court could not look to the special plea, which was found for the* defendant, *to see that the title could not come in question.*

Stead versus Gamble.

THIS was a rule calling on the *defendant* to shew cause why the master should not tax the *plaintiff* his full costs. The *plaintiff* had declared in trespass that the defendant on the 13th *April*, 1805, at the parish of *Leeds* in the county of *York*, with force and arms threw down, pulled down, burnt, and consumed by fire, and totally destroyed a large quantity, to wit, 40 perches of a certain hedge or fence of the *plaintiff*'s of great value, to wit of 100l. there then erected, standing, and being, whereby a certain close or piece of land of the *plaintiff*'s, near to the said hedge or fence, in the parish aforesaid, called Long Close, otherwise the Great Close, was exposed to damage by cattle; and divers large quantities of corn, to wit, wheat, rye, oats, and barley of the *plaintiff* then growing and being

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in the said close or parcel of land, of great value, to wit, of 10*l.* were then and there damaged eaten, consumed, and destroyed by cattle; and other wrongs to the *plaintiff* then and there did to his damage of 100*l.* The *defendant* pleaded, first the *general issue, not guilty,* and *secondly,* that the hedge was wrongfully erected in a waste or *common* whereon the *defendant* had a right of common, and that the *plaintiff* having by means of the said hedge inclosed a part of the common, the *defendant* pulled down and destroyed the said hedge, &c.; and justified for abating the nuisance. The *plaintiff* replied, taking issue on the right of common. The jury found a verdict for the *defendant* on the special plea, and for the *plaintiff* on the general issue, damages 20*s.* costs 40*s.*

The judge did not certify that the freehold came in question, &c.

LAMBE. "By stat. 43 *Eliz.* c. 6, s. 20, in actions personal not being for the title to any lands, &c. nor for any battery, in which the judge shall certify the amount of the damages to be only 40*s.* the *plaintiff* can only have the same costs as damages. And by 22 and 23 *Car. II.* c. 9, s. 136, 'in all actions of trespass, assault, and battery, wherein the judge shall not certify that the battery was committed, nor the freehold or title of the land did come chiefly in question, the *plaintiff* shall have no more costs than damages.' But these statutes have always been construed with an exception of those cases in which no certificate could have been granted, or wherein from the nature of the pleadings that is admitted which alone the judge could have certified. Here, however, the special plea is found for the *defendant,* and, at the most, it did not go to the whole trespass. The case therefore, is left as if the special plea were not pleaded, and it stood only upon the general issue. And where there was an

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SEAD *clerk* GAMBLE.

action of trespass *quare clausum fregit*, and for other trespasses, and there was a plea *not guilty* as to the *clausum fregit*, and a justification as to the other trespasses, and the justification was found for the *defendant*, and the trespass *quare clausum fregit* for the *plaintiff*, the court held it within the statute, and that there should be no more costs than damages.* In assault and battery there have been cases in which it is held that either the battery must be admitted by the pleadings, or else must be certified; see *Page* v. *Creed*,† and *Smith* v. *Edge*.‡ In the latter case there was a justification which went to the battery, and that being found against the *defendant*, the battery stood admitted. And in *Adlin* v. *Greenaway*,§ which was an action of trespass, for breaking certain panes of glass in the windows of a house, it was held that, as the *defendant* might have given *liberum tenamentum* in evidence, and the title might have come in question, it was within the statute."

HULLOCK, *contrà*. "If it can be shewn that it was impossible for the judge to certify whether the title to the soil was in question, or if it appear by the pleading that the title could not come in question, then the *plaintiff* is entitled to full costs; unless it falls within the 43 *Eliz.* c. 6, s. 2, and there might have been a certificate under that act of parliament. The 22 and 23 *C. II.* c. 9, s. 136, has always been construed to apply only to two cases, namely, to actions of trespass *quare clausum fregit*, and actions of assault and battery. Here the trespass was not *quare clausum fregit*, nor for an assault and battery, and the special plea went to deny the claim of the *defendant* to the soil, by merely shewing a right of common in the *defendant*."

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* 2 *Vent.* 180. *Anon.* † 3 *T. Rep.* 391. ‡ 6 *T. Rep.* 562. § 6 *Term Rep.* 281.

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Lord ELLENBOROUGH, C. J. "Can we look to the special pleads which are found for the *defendant*? Does it not now stand as if the general issue had been pleaded and nothing else?"

LAWRENCE, J. "The special pleadings do not apply to the thing for which the *plaintiff* has a verdict. The *defendant* has pleaded as to all except the burning, a special plea which is found for him; then is it not an action for burning a hedge?

In *Milbourne* v. *Reade*,* which was trespass for assault and battery of the *plaintiff*, at the parish of A. and also for obstructing him in getting coals, and for spoiling his cloaths, and breaking and pulling down a standard and roller of the *plaintiff*'s, and taking and carrying away other goods, and a plea of not guilty, and the *defendant* was found guilty of all except taking and carrying away the goods, there it was held that the *plaintiff* was entitled to full costs, because the title could not come in question, and the judge could not have certified. And he cited *Mason* v. *Cæsar*,† and *Cooper* v. *Marshall*‡ in order to shew that a commoner might abate a hedge as a nuisance to his common, and that it did not bring the title in question, for according to the former case, he did not thereby meddle with the soil, but only pulled down the erection. So here it is confessed that it stands on a common, which is not the soil of the *defendant*, he can only justify pulling it down but not the burning it, which stands as before on the general issue."

Lord ELLENBOROUGH, C. J. "It is stated in the declaration, there standing and being, and the name

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* *Barnes*, 134. † 2 *Mod.* 65. ‡ 1 *Burr.* 255.

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of the close is inserted with a *videlicet*, and it is as a trespass to that part of his soil which the hedge stands upon. We cannot look to the special plea."

Cur. adv. vult.

And now the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case. "By the stat. 22 and 23 *Car.* II. c. 9, s. 13, in all actions of trespass, assault, and battery, and other personal actions, unless the judge certifies that the assault and battery was sufficiently proved, or that the freehold or title of the land came chiefly in question, the *plaintiff* is entitled to no more costs than damages. In this case the declaration states a trespass in a certain close 'for destroying and burning 40 perches of the hedge therein standing and being.' Now the construction of this statute has always been, that it relates only to trespass, and assault and battery therein named; and that the action of trespass mentioned, relates only to trespasses where the freehold comes in question, and wherein the judge can certify that the freehold came in question. And that species of action is trespass *quare clausum fregit*, and the question will be whether this is that species of action in which the freehold could come in question and the judge could certify. Here is besides, a special plea that the *defendant* had a right of common, and a great deal of argument was used on that, to qualify the language of the count, and to shew that the freehold could not have been principally in question; but as that plea is found against the *plaintiff*, we cannot take that into our consideration. And upon considering the authorities, we are of opinion that this is a species of action in which a certificate of the judge is necessary to entitle the parties to costs; in as

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much as it appears to be a case in which the freehold could come in question. In *Butler* v. *Cozens*,* it was moved to have full costs in trespass *inter alia* for breaking his lock upon his gate; but POWELL, J. said this seems to be laid as a trespass to try the title, and where the freehold comes in question, there it is held full costs shall be; but where it does not, there no more costs than damages, and it was adjourned to see if the judge would certify; and in the note in the margin of *Viner's Abridgment*, it is said that it was held within the statute, for the locks were fixed to the posts and the posts to the freehold. And in *Barnes's Notes*, 121, *Tomlinson* v. *White* and *Pomeroy*, which was an action for breaking and entering the *plaintiff*'s house and breaking the cellar-door, the jury, upon the trial, found for the *plaintiff* as to the breaking of the cellar-door, damages 6d. and the residue for the *defendants*. It was held that unless it could be contended that the cellar-door was not affixed to the freehold, the *plaintiff* ought not to have costs without a certificate. In *Comberbach*, 420,† it is reported that in trespass for pulling up and throwing down a hedge, whereby cattle of strangers unknown entered and ate the grass, the court would grant no more costs than damages, there being no asportation; though it was objected, that he could not pull it up and throw it down, without removing it. The only trespass there stated is pulling down the hedge, here it is destroying the hedges there erected, standing, and being. So in *Comberbach*, 324, *Haius* v. *Hughes*, which was *tres-*

* 11 *Mod.* 198, case 254, and also in 6 *Viner's Abridgment*, 351.

† N. B. This is inserted under the case of *The King* v. *Slatford*, but evidently does not belong to that case. The notes of *Comberbach* are very ill arranged. They were a posthumous publication.

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pass for entering his close and cutting his cable, it appears from the language of HOLT, C. J. that it was not within the statute 22 and 23 C. *II.* c. 9, 'but it were otherwise,' he adds, 'if the action were for breaking his close and cutting his rails, for they are affixed to the freehold. Here the hedge 'there standing and being' is a hedge affixed to the freehold, and therefore, inasmuch as the freehold might have come in question, and there is no certificate, nor no certain proof from the pleadings to which we can refer that it could not come chiefly in question, and there are less than 40s. damages, there must be no more costs than damages."

RULE DISCHARGED.

ROE on the Demise of CHARLES PRIDEAUX BRUNE, Clerk *against* RAWLINGS.—*Feb.* 11.

Evidence. Entries in books by persons deceased.

Tenant for life with leasing power, reserving the ancient rent, receives a letter from his steward with an account of the rents, which he indorses thus; "From H. account of my estate at C." and preserves amongst his muniments, and also makes entries of the receipt of rent from the same estate in his books; a subsequent tenant for life grants a lease under the power: the remainder-man brings ejectment against the lessee; held that the letter to, and account of receipts by the first tenant for life found amongst his muniments being an authentic recognition of the amount of the rent in his time, is good evidence of the ancient rent as against the tenant under the leasing power, because that tenant for life had perfect knowledge of the fact: and had an interest to state it favourably for the tenant, by keeping down the ancient rent to enhance the fines or renewal under his own power, and it could not be used for him.

ROE dem. BRUNE *versus* RAWLINGS.

THIS was an ejectment for lands in the parish of *Padstow*, in the county of *Cornwall*. The *plaintiff* claimed as tenant in tail under a settlement on one

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Edmund Prideaux, the elder, for life, remainder to *Edmund Prideaux*, the younger, for life, remainder to *Humphrey Prideaux*, eldest son of *E. Prideaux*, the younger, for life, remainder to his first and other sons in tail male, with a power to each tenant for life of granting leases when in possession for certain terms, and so as the ancient yearly rent, or a proportionable part thereof should be reserved. All the tenants for life were successively in possession, and the lessor of the *plaintiff* was the eldest son of *Humphrey Prideaux*, which *Humphrey Prideaux* being the last tenant for life, granted a lease (for a term not yet expired, determinable on three lives still in being) to the *defendant*, at a yearly rent of 14s. and a heriot, or a fine of 3l. on each life. The question was, whether the ancient rent was reserved according to the limitation; and the attorney for the lessor of the *plaintiff* being called as a witness, produced a letter, containing an account of what were called *conventionary rents* of the manor of *Padstow*, due yearly to *Edmund Prideaux*, Esq. The letter was addressed to the Hon. *Edmund Prideaux*, Esq. within the close at *Norwich*:

"Hon. Sir,

"You have here an account of all the yearly rents which are payable quarterly, and the whole of the woods and casualties, with the rents, according as my deceased master and myself computed them *communibus annis*. And you have likewise an account of all the conventionary rents set at lease for three lives, both of the manor of *Padstow* and *Hurton*, with the two out leases in *Launceston* and *St. Stephen*, which I hope will be satisfactory."

Then followed some other statements of household concerns, and it was signed *Stephen Hobart*, and dated *Padstow*, 25th *Jan.* 1723,9. It was also indorsed in the hand-writing of *E. Prideaux*, the younger—"*Jan.* 25, 1723,9. From *Hobart*, a particular of my estate in

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Cornwall." On the other side of the letter was "An account of the estates set at a yearly rent within the parish of *Padstow*, belonging to *Edmund Prideaux*, Esq. and *inter alia* part of *Trevethan*—*John Hellyar*.—Conventionary rent for years, 21. Years to come, 20. Rent, 14l.

Books were also produced by the same witness, of *Edmund Prideaux*, the younger, containing receipts of rent; in which was an entry, "*John Hellyar*, for rent of *Trevethan*, from *Michaelmas*, 1727, per annum, 14l. collected all to *Michaelmas*, 1734." There were other entries of receipts of this rent of 14l. and at last, Total to *Michaelmas*, 1738, 14l. There were also entries of rent received, and a lease granted of another part of *Trevethan* for 12l. 5s. It was contended for the *plaintiff*, that these letters, indorsed by *Edmund Prideaux*, the younger, and the accounts, were a recognition by him that the ancient rent was 14l, this being the same estate, which bound both *Humphrey Prideaux* the tenant for life and his lessee. By the counsel for the *defendant*, it was urged that this was not evidence between the present parties, it being *res inter alios acta*. The evidence being rejected, the *plaintiff* was nonsuited; and a rule having been obtained to shew cause why the nonsuit should not be set aside and a new trial granted, on the ground that this evidence was improperly rejected,

BURROUGH and EAST shewed cause. "This is *res inter alios acta*, and the only cases in which such evidence of the declarations of third persons has been let in, are where the persons writing the accounts have charged themselves with the amount or with part of it. Here *Hobart* charges himself with the receipt of none of the rents. There several documents state the number of years of the lease, and this lease for such a number of years of *Trevethan* to *Hellyar* must have been by

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deed, and the counterpart ought to have been produced. In *Outram* v. *Morewood*,* in order to shew that the *locus in quo* was part of the lands formerly in the family of *Zouch*, an entry was produced, in the hand-writing of *Rowland Morewood*, of the receipt of certain rents for the close, the identity to which it was necessary thereby to establish. The *defendant* claimed under *Rowland Morewood*, as to the rents, but the question was as to the right to dig coal under the land in which *Rowland Morewood* had no interest. There was a verdict for the *defendant*, and upon motion for a new trial, it was held that the evidence ought not to be received, because it was an entry by a third person which could not bind the opposite party. In some other cases, where an entry by parish officers of the receipt of money by officers of a township, from the officers of another township, of a proportion of church rates, made in a parish book, has been admitted, to charge the latter officers with the same proportion in future; that has been admitted because they are made by persons who charge themselves with the receipt of money, and put the book into the hands of those who may enforce the charge."

LAWRENCE, J. "Upon what principle is that but because it is improbable that any person should charge himself with any thing that is against himself, without foundation."

Lord ELLENBOROUGH, C. J. "You have no circumstance to shew that there is any motive to misrepresent. The charge against himself is only a circumstance to shew his indifference: and here he can have no interest, for he cannot use it for himself."

EAST. "*Rowland Morewood* was perfectly indifferent

* 5 Term Rep. 121.

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in point of interest, yet notwithstanding that, and merely because the entries were by a third party, and he was not charging himself with any thing, the entries were held to be inadmissible; the other cases of *Barry* v. *Bebbington*,* *Stead* v. *Eaton*,† *Warren* v. *Webb*,‡ which proceed upon the ground that the party is charging himself, are the only exceptions to the rule, *res inter alios acta* shall never be made use of as evidence against third parties."

The SOLICITOR GENERAL, LENS, Serj. and DAMPIER, *contrà*. "The question as to what was the rent previous to the year 1778, is material in the cause. Then this receipt is of rent in 1789; but it is said that this is not evidence of the rent in 1778: But when it is shewn that 14l. was received for rent that year, it is evidence that more than 14s. was the value previously to 1778. Indeed the settlement is with a power to lease reserving the ancient rent, and the present value is the ancient rent until the contrary is proved, and that alone would have been sufficient to shew the lease to be void until the *defendant* shews that it was less; but as that was not urged at the trial, it will not be insisted now, that there ought to be a new trial on that ground. As to these accounts, it was the interest of each person having the leasing power to keep down the rent as low as possible, in order to enhance the value of his leasing power. It was their interest also to shew what was the rent, because that was a part of their title; and, therefore, we should expect to find amongst their papers an account of what each of the estates let for. This is a letter of the person who was steward of the estate, and it is not necessary to give extrinsic evidence in support of it.

* 4 Term Rep. 514. † 4 Term Rep. 669. ‡ 2 *Strange*, 826.

East cited also *Calvert* v. *the Archbishop of Canterbury*;*

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Cur. adv. vult.

And now the judgment of the court was delivered to the following effect, by Lord Ellenborough, C. J. after stating the case. "The paper produced appeared to be written by a person in the confidential employ of the person to whom it was addressed, and it contained memorandums of payments and dues to the owner of the estate, and accounts of the terms outstanding. The person to whom it was addressed, and in whose possession it was found, and by him handed down as a family muniment, was a person having an estate for life with a limited leasing power reserving the ancient rent; and this paper recites that the sum of 14*l.* was payable on the rent or lease from *Michaelmas*, 1727. And the question is, whether this is admissible evidence, as against the person who now enjoys the estate by the virtue of the leasing power, to shew the value of the then letting rent? On this it must be observed, that the person who held the estate had a power of letting on lease, reserving the ancient rent; and this paper was adverse to the interest of the person in whose possession it was found; for every thing which raises the rent diminishes the value of the leasing power, and affords the heir or reversioner an opportunity of ascertaining the real value. The interest of the party therefore obviates all suspicion of its being a misrepresentation on his own side. The paper is also written by a confidential agent, at least, of the then owner of the estate. For it is indorsed '*January* 25th, 1728; from *Hobart*, a particular of my estate in *Cornwall*," and is addressed to the Hon. *Edward Prideaux*, Esq., which is a recognition by the

* 2 *Esp.* N. P. 461.

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person to whom it was addressed, that the writer bore the character which he represents, and has that confidential situation which he states in the letter; though perhaps it does not import that he was steward; and the question is, whether this declaration by the then occupier of the estate recognising the contents of the letter, is good evidence of the value in this case? The party against whom it was produced, did not derive title from him. If he had, there would have been no question. But still it appears that this is not only free from the objection of interest, but that the person was not only disinterested in respect of this fact, but had an interest the other way; and therefore we think it is evidence to go to a jury. In many cases of facts difficult to be proved from length of time, the entire absence of any interest to induce a misrepresentation, has rendered the declaration of persons evidence after their death. As for instance, in a question of the age of a son who had made a will, which is evidence of a particular fact, and not of pedigree, the fact of the time when the son was born has been proved by the declarations of the deceased father. Thus, giving effect to the uninterested declarations of the father, under such circumstances, it has been held evidence of the son's being born at a certain time and being under age when the will was made. In that case the most that can be made of it is the knowledge of the father of the particular fact, and the total absence of interest to pervert the fact. So also in the case of a deceased rector, who states the value of *tythe* in a book; this has been held evidence against the successor. Now that depends on the absence of any interest to mistate it; for the books would be no evidence in ordinary cases for the rector making the entry. And as these books and papers if they could ever meet the eye might have been used adversely to *Edmund Prideaux*, and not in his favour, he could have no interest in perverting them or misrepresenting any thing.

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This therefore on all the principles on which such evidence is admitted, comes in a shape to be received. In many cases, *ex necessitate*, the evidence of old deeds and papers is received without proof in support of them, as deeds of 30 years old. In those cases it depends on the regularity of the custody in which they are kept and the circumstances under which they are preserved, whether they are evidence or not, and the finding them in the hands of the parties with whom, according to their tenor, they ought to be placed, is in such cases proof that they were fairly preserved. So here the then situation of the party out of whose hands this paper came, removed all objections to its competence; and, without recurring to other instances, the entry in the books stands on the same foundation as the letter, because the entries in the books equally fixed the rent adversely to the parties themselves. This evidence therefore was clearly admissible."

Rule Absolute.

Stammers *against* Dixon.—February 6.

Prima tousura. Evidence. Copyhold. Construction of court-rolls.

One claimed the first grass or prima tonsura *by copy of court-roll under a grant of* tres acras prati; *but another had the after-grass, and lopped the trees, and cleansed the ditches, and repaired the fences, and exercised all other acts of ownership. And upon* trespass quare clausum fregit, *and an issue whether it was the* plaintiff's *close, soil, and freehold, or copyhold of a certain manor, held that the* plaintiff, *as owner of the after-grass and pasture, might establish his claim to the freehold by evidence of acts of ownership, notwithstanding the grant of* tres acras prati *by copy. For there may be a freehold right in the one thing (the soil) and a copyhold in the other* (prima tonsura.) *And* pratum *may mean only the first grass therein, if warranted by the possession, which guides the construction of old grants. And* prima tonsura *is not conclusive but merely* prima facie *evidence of the freehold; but the word* close *must mean, in pleading, the freehold. And this was so held; though he who has* prima tonsura *paid all the taxes, for that was merely by his negligence.*

1803.

STEMERS versus DIXON.

THIS was an action of trespass for breaking and entering the *plaintiff*'s close called *Bird's Mead*, at *Langford*, in the county of *Essex*, and there taking the soil and throwing it into a ditch, whereby the *plaintiff*'s lands were overflowed, and for removing a tunnel, &c. There were several counts. The *defendant* pleaded the *general issue*, and also that the *locus in quo*, was a copyhold tenement, and part of the manor of *Acton Peverell*, to which one S. S. was admitted, and justified under that admission. And issue was joined on the not guilty, and also on the issue, whether the close was a copyhold tenement, &c. At the trial before HEATH, J. at *Essex*, it appeared that it was low meadow land, containing 3 acres, bounded on one side by a brook, where the tunnel was placed. The *plaintiff* had cleansed the river, and laid part of the mud on the land to raise the banks and the *defendant* threw back the mud into the river. This was one of the trespasses, and the other was removing the tunnel out of the brook. Exclusive acts of ownership by cutting and repairing hedges, and cutting down two trees, were proved for 60 years back, on the part of the *plaintiff*. It was admitted that the *plaintiff* also had the pasturage from old *Lammas* to old *May day*, but the *defendant* had the *first crop*. The *plaintiff*'s predecessor had repaired the grip or ditch bounding the close, and the former tenants had scoured the river. For the *defendant*, the old copies of court-roll of the manor of *Acton Peverell* were produced, granting "*tres acras prati vocat' Monks' Hope*, and the several admissions thereto up to the present time by the same title of three acres of meadow called *Monks' Hope*, &c. down from the reign of *Elizabeth*; and it was proved that one of the tenants so admitted had cleansed the grip or ditch twice. And that they had paid all the taxes, parish-rates, and high-way rates, for the three acres. The learned judge reported that he left it to the jury to say whether the evidence upon

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the acts of ownership and possession of the land were with the *plaintiff*; and upon the foreman of the jury asking whether they were to take into their consideration the entries and admissions of the copyhold, he told them by no means; as they had found that the evidence in respect of these acts of ownership was in favour of the *plaintiff* that was decisive, as, by reason of usage, the words of the grant may be restrained and only pass the forecrop instead of the soil. And the jury then found a general verdict for the *plaintiff*. But the learned judge permitted the counsel for the *defendant* to move for a new trial and to enter a verdict for the *defendant*. The rule, however, was obtained only for a new trial, the court thinking that the verdict could not be so entered, if it was set aside on account of the jury not having had the admissions left to them.

SHEPHERD and BAYLEY, Serjts. shewed cause. "The effect of the plea is, that the close is part of the manor, of *Acton Peverell*, and, although, if the *defendant* had justified under the grant which has been produced, that the *forecrop* was thereby granted to him, and he entered and took the *forecrop* that would be a defence to the action, yet upon the pleadings as they now stand, the question is, whether he is tenant of the close altogether and not merely of the forecrop? One may indeed hold the *forecrop* and the other the *land*; and the court-rolls of the admissions of the *defendant* and his predecessors, are no evidence as against the *plaintiff*, any more than the title-deeds of the *defendant*; without proof of possession going according to those title-deeds; and here it may happen that the one part, the *prima tonsura*, to which the *defendant* is entitled, may be copyhold and the other freehold. The right to the soil is then to be explained by other evidence, and every act of ownership, such

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as cutting trees, putting up fences, &c. was exercised by the *plaintiff* and his predecessors, and on the other side it was only shewn that the *defendant* had once or twice cleansed the ditches."

GARROW and MARRYAT, *contrà*, cited *Ward* v. *Petifer*,* as in point to shew that "if a man hath the grant of the first grass or *prima tonsura* the freehold is in him, and the lord who hath the after-grass hath but the profits in nature of common."

LAWRENCE, J. "*Newstead* v. *Keys*,† Lord *Kenyon* said, "that case was not quite accurate. It meant only that *prima tonsura* was evidence of having the freehold."

Lord ELLENBOROUGH, C. J. "They say there that ejectment will lie for *prima tonsura*, and unless other matter be shewn to the contrary, the freehold is in him who hath the *prima tonsura*. Here the *plaintiff* lopped two trees."

MARRYAT, then argued that the grant and possession of the *prima tonsura* was better evidence of the freehold or soil than the other evidence on the part of the *plaintiff*, and that, at any rate, the jury should have had the grant and admissions to the *tres acras prati* referred to them.

Lord ELLENBOROUGH, C. J. "The learned judge reserved to himself the true legal question of the operation of the admissions; saying that it might mean either way, according to the acts of ownership; as if he had said to the jury, 'You tell me how the usage is as to the possession, and I will tell you what

* *Cro. Car.* 362.

† The court adds, "unless other matter be shewn to the contrary;" but in the marginal abstract it is taken as decided that the freehold is in him who has the first grass. 34 *Geo. III.* M. S.

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STAMMERS *qui tam* DIXON.

the effect of the admission is. When the question was begun to be discussed, I was of opinion that the verdict of the jury was right, though I doubted whether the direction of the learned judge was strictly correct in terms; but I now think that the direction of the learned judge, was right as well as the verdict. This is an action of trespass to a close called *Bird's Mead*, or *Monks' Hope*. The *defendant* pleads not guilty, and a justification under the lord and tenant considering it as a copyhold tenement held of the manor of *Acton Peverell*. The word *close* means the entire interest, and if the *defendant* fails in making out, that he has the close and the whole interest in it, he fails altogether. The evidence as to the right of the *defendant* is confined to the first crop, every other benefit after the grass was taken has belonged to those under whom the *plaintiff* claimed. And in favour of the possession, we must construe the rights of the parties such as may best consist with the possession. There may exist a right of copyhold in the *prima tonsura*, and a right of freehold in the soil. The admission as between the lord and tenant is conclusive, though that admission is not the most cogent evidence as between other parties. But giving all the full effect to the admissions, is not the word *pratum* capable of receiving a construction narrower than that which imports the whole interest in the soil? The learned judge saw that, and was of opinion that if the jury thought that there was a possession entitling the *defendant* to less than the whole interest, he might so construe it. If so, it was necessary to put only the question of fact, how has the enjoyment been? And he properly says, if you find that the usage was so as to establish all but the *prima tonsura* in the *plaintiff*, I will tell you that in law you may so find it for the *plaintiff*. Now *prima tonsura* does not necessarily imply the close and the interest in the whole soil to bein the possession of him who has the right to the *prima tonsura*.

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There is therefore no objection to the direction, and still less to the finding of the jury."

LAWRENCE, J. Of the same opinion. "I understand the learned judge, as the report state it, to have told the jury not to consider the admissions, because the construction of them was with him. He did not mean to deny, that they were to find that the party was admitted to *tres acras prati*, but that they were not to attend to the construction of deeds, but to find on which side the weight of the evidence was as to the usage, and then to find the verdict accordingly. As to the taxes, they were clearly wrong, for admitting it to be one way or the other, the burthen of the taxes ought to be thrown equally upon both, and payment by one proves only that by the negligence of the persons concerned the burthen of the taxes was improperly thrown."

LE BLANC, J. was of the same opinion; and "that if it went down for a new trial, it would only be for the judge to tell the jury to find according to the usage, and that the admissions would not be inconsistent with such a usage.

RULE DISCHARGED.

LINE *against* LOWE.—11*th* Feb. 1806.

If a defendant is superseded for want of being charged in execution, he cannot be taken in execution again, upon that judgment.

Practice. Execution. Ca. sa. Supersedeas.

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THIS was a rule to shew cause why the *defendant* should not be discharged out of custody upon a *ca. sa.* and why the writ should not be set aside with costs for irregularity, the *defendant* having been once in custody before, and superseded for want of being duly charged in execution, upon the same judgment.

WIGLEY, in support of the rule, WOOD shewed cause.* The court took time to consider, and on the next day the judgment of the court was delivered in this case to the effect following, by

Lord ELLENBOROUGH, C. J. "The party being superseded for want of being duly charged in execution, the question now arises, whether, having been so superseded for want of being charged in execution in due time, according to the practice, he could be afterwards taken in execution upon a *ca. sa.* on that judgment. Having some doubt upon this subject, and looking at the printed book of rules and orders in the court of *King's Bench, Trinity, 2 Geo. I.* there is a note in the margin, which lays down the practice on this subject, and we wished to see if it was warranted by authority. It states, if the *defendant* supersede for want of proceedings before judgment, yet the *plaintiff* may afterwards take the *defendant* in execution; but otherwise, if the party is superseded for want of charging in execution. And upon searching, we find this is warranted by authority. For

* I was not present when cause was shewn.

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in *Clarke* v. *Venner*,* which was a motion to discharge the *defendant* out of execution, who was before discharged for want of the *plaintiff*'s proceeding to judgment, afterwards the *plaintiff* proceeded to judgment, and took the *defendant* in execution. Mr. Justice *Denton* said he had consulted with the justices of the court of *King's Bench*, and one of the judges told him the constant practice of that court was, that where a *defendant* is discharged for want of proceeding to judgment, the *plaintiff* may afterwards proceed to judgment, and take him in execution thereon, and he shall not be discharged. But if the *plaintiff* had proceeded to judgment, and the *defendant* was discharged for want of being charged in execution, he should be totally discharged, and cannot after that be charged in execution. And in *Wright* v. *Kenswell*,† which is also recognized in *Cowper*, 72. a *supersedeas* was granted, to discharge the *defendant* for the *plaintiff*'s not proceeding to judgment; afterwards the *plaintiff* proceeds to judgment, and the *defendant* being taken in execution, now moved for a supersedeas, the *defendant* having been discharged on the former supersedeas; the court took time to consider of it, and afterwards determined that the *defendant* might be taken in execution, though he had been discharged for want of proceeding to judgment; but if it had been for want of proceeding, after judgment, to charge the *defendant* in execution, then it would have been otherwise, and he would have been entitled to his discharge.

Upon these authorities we think that the party cannot be taken in execution having been once discharged for want of proceeding to execution. And although in that case of *Clarke* v. *Venner*, it is said that Mr. Justice *Denison* was informed by one of the judges of

* Cases of Practice, *C. B. p.* 136. † *Ib.* 135, *and Barnes*, 376.

the *King's Bench*, that such was the practice, yet it was upon consultation had with both the courts. And as this is a question of irregularity the rule must be

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DISCHARGED with costs, but the *defendant* not to bring any action for the imprisonment.

IGGULDEN *against* MAY.—11th Feb.

Lease for 21 years in consideration of 5l. 8s. for a fine, and a rent of 6s. 8d. with a proviso of distress if the rent should be behind 14 days. Covenant by the lessor at the end of 18 years, or before at the request of the lessee, "to grant a new lease for the like fine, for the like term of 21 years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture contained." The lessor upon request tendered a lease with all covenants, except a covenant for a renewal. The lessee brought covenant for not executing a lease, and averred that the said covenants corresponded with those in various other leases, before then successively made and executed of the premises, on renewals from time to time granted. Held, that the lease tendered was sufficient; and, admitting that such an averment could properly be introduced upon the record, to explain the intent of the parties, of which there was great doubt, yet it might be satisfied, although there were many instances of leases to the contrary.

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THE *plaintiff* declared in covenant upon an indenture of lease, dated the 29th *September*, 1783, at *Deal*, between one *John Dilnot*, of the one part, and the said *John Iggulden*, *Elizabeth Fleetwood*, and *Sarah Iggulden*, of the other part; whereby in consideration of 5l. 8s. by way of fine and of the rent therein after reserved, the said *John Dilnot* did demise to the said *John Iggulden*, *E. Fleetwood*, and *Sarah Iggulden*, their executors, administrators, and assigns, all those 27 perches of ground, and the several messuages or tenements, outhouses, and buildings thereon situated, lying and being in *Lower Deal* to have and to hold, to them, their executors, admi-

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nistrators and assigns, for the full end and term of 21 years, from thence next ensuing and fully to be complete and ended; yielding and paying therefore yearly the rent and sum of 6s. 9d. of lawful money of *Great Britain*, at the feast day of *St. Michael* the archangel, or within fourteen days next after the said feast day. And if it should happen that the said yearly rent should be behind, and unpaid in part or in all by the space of 14 days next after any feast day of *St. Michael* the archangel, during the said term, that then and from thenceforth it should and might be lawful to and for the said *John Dilnot*, his heirs and assigns, into and upon the said demised premises, or any part thereof, to enter and distrain, and the distress and distresses there found and taken from thence to bear, carry away, detain, withhold, and keep until the said yearly rent and the arrears thereof, should be to him the said *John Dilnot*, his heirs and assigns, well and truly satisfied and paid; and the said *John Dilnot*, for himself, his heirs, and assigns, did covenant and grant to and with the said *John Iggulden, Elizabeth Fleetwood*, and *Sarah Iggulden*, their executors, administrators, and assigns, and every of them by the said indenture in manner following; that is to say, that the said *John Dilnot*, his heirs and assigns, at the end of 18 years of the said term of 21 years, or before, upon request to him or them, made by the said *John Iggulden, Elizabeth Fleetwood*, and *Sarah Iggulden*, their executors, administrators, and assigns, and at the proper costs and charges of the said *John Iggulden, Elizabeth Fleetwood*, and *Sarah Iggulden*, their executors, administrators, or assigns, should and would make, seal, and deliver unto the said *John Iggulden, Elizabeth Fleetwood*, and *Sarah Iggulden*, their executors, administrators, or assigns, a new lease of the said 27 perches of ground, with the appurtenances, for the like fine or consideration of 5l. 8s. for the like time and term of 21 years, at the like yearly rent of 6s. 9d.

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payable as aforesaid, with all covenants, grants, and articles as in the then present indentures were contained, meaning the said indenture; by virtue of which said demise the said *John Iggulden*, *Elizabeth Fleetwood*, and *Sarah Iggulden*, entered and became thereof possessed. The declaration then stated, divers mesne assignments, whereby the premises became vested in the *plaintiff*, who entered and was possessed thereof for the residue of the term; that the reversion during the continuance of the said term, came to and vested in the said *defendant*, who from thence continually hitherto hath been and is still intitled thereto. And the *plaintiff* averred that the aforesaid indenture of lease contained no other covenant, grant, article, or clause than such as are hereinbefore recited and set forth; and that the covenants, grants, and articles, in that indenture contained, correspond (except as to the date and names of the parties, with those expressed in various other leases before then successively made and executed of the premises comprised in the said first mentioned indenture by the owners, for the time being, of the inheritance thereof on renewals from time to time, granted by such owners at the like yearly rent of 6s. 9d. in consideration of a like sum of 5l. 8s. paid in the nature of a fine, upon every such renewal. That the *plaintiff* duly performed the covenants on his part; and assigned a breach, that, after the said assignment of the said reversion to the said *defendant* as aforesaid, and whilst the said *plaintiff* continued so possessed of the said demised premises as aforesaid, and before the end of eighteen years of the said term of twenty-one years granted by the said indenture of lease, to wit, on the twenty-first day of *September* in the year of our Lord 1801, at *Deal* aforesaid, he the said *plaintiff* gave notice to the said *defendant* of the said demised premises having been so assigned to him the said *plaintiff* as aforesaid; and then and there requested the said *defendant*, as assignee of the said rever-

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sion as aforesaid, at the proper costs and charges of the said *plaintiff*, to make, seal, and deliver unto him a new lease of the said twenty-seven perches of ground, with the appurtenances for the like fine or consideration of 5l. 8s. for the like time and term of twenty-one years, at the like yearly rent of 6s. 9d. payable as in the said indenture of lease is mentioned, with all covenants, grants, and articles, as in the said indenture of lease were contained, and particularly with such covenant or article for renewal as is contained therein, under the like terms as expressed in that indenture, according to the form and effect of the same indenture, and although the said *plaintiff* was then and there ready and willing, and offered to the said *defendant* to bear and pay the costs and charges of such new lease, and to pay him such fine or consideration of 5l. 8s. as last aforesaid, yet the said *defendant* did not nor would at the time when he was so requested as aforesaid, or at any time afterwards, make, seal, or deliver unto the said *plaintiff*, a new lease of the said 27 perches of ground, with the appurtenances for such time and term of twenty-one years at such yearly rent of 6s. 9d. payable as is in the said indenture of lease mentioned, with all covenants, grants, and articles as in the said indenture of lease were contained, &c.

The *defendant* after oyer of the indenture, protesting that the covenants, grants, and articles, in the said indenture of demise contained, do not correspond with those expressed in various other leases before then successively made, and executed of the premises comprised in that indenture by the owners for the time being of the inheritance thereof, upon renewals from time to time granted by such owners as in the said declaration is above alledged, that pleaded continually since the said *defendant* became seised of the said reversion of the said demised premises, and the said *plaintiff* became possessed thereof for the residue of the said term, he the said *defendant* hath been and is ready and willing to make, seal,

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and deliver unto the said *plaintiff* a new lease of the said 27 perches of ground with the appurtenances, for the like fine or consideration of 5l. 8s. for the like time and term of 21 years, at the like yearly rent of 6s. 9d. payable as in the said indenture of demise mentioned, with all such covenants, grants, and articles, as in the said indenture of demise are contained, excepting only the said covenant or article therein contained for granting a new lease of the said demised premises, to wit, at *Deal* aforesaid, whereof the said *plaintiff* there had notice, and that he the said *defendant* when he was so requested to make, seal, and deliver a new lease of the said premises as in the said declaration is mentioned, to wit, on the 27th day of *September*, 1801, at *Deal* aforesaid, did make and seal a new lease of the said 27 perches of ground with the appurtenances unto the said *plaintiff*, for the like fine or consideration of 5l. 8s. for the like time and term of 21 years, at the like yearly rent of 6s. 9d. payable as in the said indenture of demise is mentioned, with all such covenants, grants, and articles, as in the said indenture of demise are contained, excepting only the said covenant or article therein contained for granting a new lease of the said demised premises, and that he the said *defendant* did also then and there give notice to the said *plaintiff*, that he the said *defendant* had made and sealed such lease as aforesaid, and did also then and there tender and offer to deliver the said lease so made and sealed by him the said *defendant* to the said *plaintiff*, which the said *plaintiff* then and there wholly refused to accept; which said lease so made and sealed by the said *defendant*, and so tendered and offered as aforesaid, is as follows, (here the lease was set out *verbatim*.) And the said *defendant* further says, that the premises comprized in and described by the said lease so made and sealed, and tendered, and offered by the said *defendant*, are

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the same identical premises which are mentioned and demised by the said indenture of demise by the said *plaintiff*, brought here into court, &c.

To this there was a general demurrer, and the *defendant* joined in demurrer; which was argued in *Easter term* last by MARRYAT, for the *plaintiff*, and ABBOTT, for the *defendant*. I was not present during the argument; but the judgment of the court goes so fully into the case, and the opinion of the Lord Chancellor is so fully detailed in the report of the same case in the court of *Chancery*, in 9 *Vezey*, Jun. 325,* that it would be unnecessary to state them. The cases and authorities mentioned in the margin below appear from the papers in the cause to have been principally referred to.†

And now the judgment of the court was delivered to the following effect by

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* It was by the direction of the Lord CHANCELLOR that this action was brought.

† *Cases referred to for the plaintiff*—*Cooke* v. *Booth*, Coup. 819, by Lord *Bathurst*, Lord *Mansfield* and others, 1798; *Bridges* v. *Hitchcock*, 5 *Bro.* P. C. 6, *House of Lords*, 1715; *Earnival* v. *Crewe*, 3 *Atkins*, by Lord *Hardwicke*, 1742; *Anderson* v. *Pitcher*, 2 *B.* and *P.* 164. *Har.* Arg. 425, 427, 436, 438, 440, 411. *Cases referred to for the defendant*—*Hyde* v. *Skinner*, 2 *P. Williams*, 196, by Lord *Macclesfield* in *Michaelmas*, 1723; *Davis* v. *Taylor's Company*, *Harg.* Arg. 427, by Sir *Joseph Jekyll*, 1726; *Russell* v. *Darwin*, 2 *Bro.* C. C. 639, by Lord *Camden*, (notes) 1767; *Reece* v. *Lord Dacre*, 2 *Bro.* C. C. 638, by Lord *Thurlow*, 1788; *Tritton* v. *Foote*, 2 *Bro.* C. C. 636, by Lord *Thurlow*, 1789; *Earl of Inchiquin* v. *Burnell*, *Harg.* Arg. by Irish House of Lords, 1795; *Baynham* v. *Guy's Hospital*, 3 *Ves.* Jun. 298, by Lord *Alvanley*, 1796; *Eaton* v. *Lyon*, 3 *Ves.* Jun. 690, by Lord *Alvanley*, 1798; *Moore* v. *Foley*, 6 *Ves.* Jun. 232, by Sir *William Grant*, 1801; *Taylor* v. *Stibbart*, 2 *Ves.* Jun. 437, by Lord *Roslyn*, 1794.

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Iggulden versus May.

Lord ELLENBOROUGH, C. J. after reading over the pleadings and observing "that the words upon which the question for the decision of the court principally arose, were these, '*with all covenants, grants, and articles as in these present indentures are contained*;' the question arising upon the whole of this record is, whether the *plaintiff* Mr. *Iggulden*, was entitled to have a lease executed to him, containing the covenant of renewal; and which question principally depends on the intent of the parties to be collected from an instrument inaccurately framed, and from its shortness affording little matter from whence arguments can be drawn to explain the meaning of it. The rules of construction applicable to covenants are so well known, that it is unnecessary to shew that every covenant is to be explained by the words in the context; by what goes before and what follows, *ex antecedentibus et consequentibus*, which is the rule in *Plowden*,* and according to the reasonable sense and construction of the words themselves. According to which rule, and paying a due attention to the apparent intent of the parties, covenants expressed in large and general terms have been narrowed in their construction; *Gage* v. *Paxton*,† and *Broughton* v. *Conway*;‡ now by applying that rule to this case, it is to be seen whether the construction of this covenant "to grant a new lease of the premises for the like fine or consideration of 5*l*. 8*s*. for the like time and term of 21 years, at the like yearly rent of 6*s*. 9*d*. payable as aforesaid, with all covenants, grants, and articles, as in these present indentures are contained;" I say it is to be seen, whether the construction of these words is not to be narrowed, so as to except this particular covenant. And though some attempts were made in argument on the part of the *plaintiff* to shew that this

* *Plowden*, 325. † See 1 *Leon*, 116. ‡ *Moore*, 58.

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indenture contained particular words indicating an intention in the parties that this should be a covenant for a *perpetual renewal*; yet we are to consider whether that be the true construction of these words, and the case necessarily resolves itself into this question, namely, whether a covenant 'to grant a new lease with all covenants, grants, and articles,' &c. can be satisfied by tendering a lease of all covenants except the covenant for a renewal. The argument that a covenant for a lease with all the covenants cannot be satisfied by a lease with all but one, will be found to have no weight with the court, if, according to the fair construction of the lease, that one covenant shall appear to have nothing to do with the subject matter to be granted. The covenant is 'at the end of 18 years of the term of 21 years, or before, at the request and costs of the lessors, their executors, administrators, and assigns, to make seal, and deliver to them a new lease for the like time and term of 21 years, with all covenants, grants, and articles, as in that indenture contained. These words are clear and unequivocal. The subject matter therefore of the grant is one lease not leases. It is to grant a new lease; and a new lease means the same as one new lease, if the parties contracted for one lease. The covenants to be introduced must be commensurate with the duration of such lease and suited to it. And the words, 'with all covenants, grants, and articles, as in these present indentures are contained,' amount only to a general and lax expression of what was before contained in the lease, namely, all provisions relative to the enjoyment of the same for the same term of 21 years, as are contained in the present lease relative to the now subsisting term of twenty-one years. If the continued grant of successive leases, were intended, words should have been used more plainly expressing the right to a continued re-

newal, instead of words applicable to one renewal. The argument for the *plaintiff* rests on that which is not the natural construction of such a covenant; it is a construction, as it is supposed, arising out of the intention of the parties, without any adequate consideration, which leads virtually to a grant in perpetuity. Whereas, the other construction of the words of the covenant looks only for a single renewal of the lease, for the same term, and this is more reasonable and more to be adopted by a court of justice. The case on the part of the *plaintiff* supposes it was the intention of the parties, that this should be a covenant for a perpetual renewal. If such had been their meaning, they might and they would (their interest being concerned) have found words, which without difficulty or ambiguity, would have expressed that intention, and which would obviously have occurred to the most unexperienced draftsman. Had the words 'and so from time to time,' been added at the end of eighteen years, that is to say, suppose the covenant had run thus, 'that the *defendant* covenanted at the end of eighteen years to grant the *plaintiff* a new lease, and so from time to time,' the design of the parties would have been clearly and unequivocally pointed out. Possibly cases may be put of grants such as the *plaintiff* contends for, and where they would be by no means unreasonable or improper. As in the case which was put in argument, in the court of Chancery, that this might be originally unprofitable sea beach, and that the owner might reasonably part with it without any prospect of increasing his fine; for while the leases were renewing, he would have a certain gain; and, when at an end, the lessor could not be in a worse situation than he originally was. And on the other hand, it was but reasonable that the lessee should be at liberty to give it up, if the experiment did not answer at the end of the first twenty-one years. But the answer to this, and other

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supposed cases, appears to be this; if such had been the views of the parties, they would not suffer their intentions to have rested on words that were ambiguous. Persons so attentive to their eventual interests would have expressed themselves by words clearly calculated to insure these views. As to the argument on the word covenants, in the plural number, we think it has not much weight; and from the loose and vague language of this provision, and the fair import of the whole, the word '*covenants*,' is literally satisfied by granting one new lease with the covenant of renewal, for a good title and quiet enjoyment; and the lessees being bound by no other covenant than to pay the rent in the indenture. On the cases that have been cited for the *plaintiff*, it will not be necessary to say much; for the words in them all differ from those of the case in question; and in most of them the intention of a perpetual renewal may be fairly inferred. The only case on this subject, which has been decided in a court of law is, the case of *Cooke* v. *Booth*.* That is certainly a case very analogous to the present, both in respect to the words of the covenant and in some respect of the fact of successive renewals. In that case there was a series of successive renewals uniform and unbroken, containing the same clause of renewal, and it was alledged that the covenants correspond with them; but, in this it is only alledged that they correspond with those in various other leases successively made, which allegation might be proved, although there were many instances to the contrary. That case was decided on two grounds. First, it was said that the parties themselves by a number of successive renewals in the same terms, had put their own construction on the words of that covenant in that case, by which they were bound.

* *Cowp.* 819.

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And on that first ground the judgment of Lord *Mansfield*, of Mr. Justice *Willes*, and of Mr. Justice *Ashhurst*, proceeded, and Mr. Justice *Buller*'s judgment went on another ground, namely, on the authority of the case of *Bridges* v. *Hitchcock*.* As to the first of these grounds inasmuch as the fact stated respecting the successive renewals so materially differs in this case from that of *Cook* v. *Booth*, this case cannot be governed by that, even if it were possible, in any form of action, to bring upon the record, with reference to the former leases, the fact of the contract contained in the last lease. On that subject, it is unnecessary to discuss what was said in *Moore* v. *Foley*,† and by Sir *William Grant*, at the Rolls, in 9 *Vezey*, Jun. 335, where great doubts have been raised upon it; nor can the second ground govern this case, namely, the authority of the case of *Bridges* v. *Hitchcock*. That was a case very different in its circumstances from the present, for there, as was observed in argument, was a covenant to grant such further lease as should by the lessee be desired, without any fine, and under the same rents and covenants only as in that lease. So that the covenant left the lessee to require a lease for any term, provided there should not be any other covenants than those in the present lease, and it was not unfair to presume, that as he might require a lease for any length of time, he might require one with a covenant for a perpetual renewal. As to the case of *Furnival* v. *Crewe*,‡ Lord *Hardwicke* relied in that case on the words, 'and so to continue the renewing of such lease or leases to *Thomas Moore* or his assigns paying as aforesaid,' and his lordship was of opinion in that case that the *plaintiff* was entitled to a new lease with a covenant of renewal to be inserted in it. But in

* 1 *Bro. Parl. Cases*, 522. † 6 *Vezey*, Jun. 238.
‡ 3 *Atk.* 84.

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the present case there is not one word analagous to these. As to the following authorities of *Hyde* v. *Skinner*,* decided by Lord *Macclesfield*; of *Russell* v. *Darwin*,† decided by Lord *Cambden*; and of *Moore* v. *Foley*,‡ decided by Sir *William Grant*; in all of these there was a covenant to renew, but in all of them moreover, it was held there should be no *perpetual renewal*; and although these cases were decided in a court of equity, yet the judge was bound to put the same construction on the instrument under consideration as a judge sitting in a court of common law. On these authorities, as well as on the reason of the thing, we are all of opinion that the *plaintiff* was not entitled to have a new lease executed to him containing the covenant of renewal, and therefore there must be judgment for the *defendant*.

JUDGMENT for the DEFENDANT.

Lord KINNAIRD and others *against* LYALL.

Error. Supersedeas. Leave to take out execution.

Error in parliament on judgment in B. R. Plaintiff *in error dies in vacation.* Plaintiff *in B. R. sues out execution tested in the term preceding; held irregular, because at the teste of the writ there was error pending, and execution could not be taken out in that case without leave. And where, in the next term after the* defendant *in B. R. died, the* plaintiff *moved for leave to sue out execution tested of the term preceding; it was refused, because the error must appear on the record.*

Kinnaird and Others *versus* Lyall.

THIS was a rule to shew cause why the *testatum fieri facias*, issued in this cause, should not be set aside for irregularity, and the sum of —l. paid into the hands of the sheriff of *Sussex*, by the executors

* 2 *P. Wms.* 196. † 2 *Bro. C. C.* 629.
‡ 6 *Vezey*, Jun. 232.

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of the *defendant* should not be returned to them, and the *plaintiff* pay the costs of the application; the irregularity complained of was, that the writ issued pending a writ of error in parliament to reverse the judgment upon which it was founded. The original action was brought in this court upon two bills of exchange, and, after a sham plea, judgment was signed in this court and error brought in the *Exchequer Chamber*, which was affirmed on the 13th of *November* 1805; and on the 16th of *November*, after the record had been remitted to this court, a writ of error was brought and allowed in parliament, pending which, and before it was returned and certified, the *defendant* died, viz. on the 9th of *December*. The *plaintiff* then sued out, on the 14th of *January* 1806, a *testatum fi. fa.* returnable this term, and tested the 21st *November* 1805, founded upon a *fi. fa. tested* the first day of last *term* and returnable the 21st of *November* 1805. The objection taken to the writ was, that, although the writ of error in parliament abated by the death of the party in vacation, yet, that, as the *plaintiff* in suing out a writ of execution *tested* during the term preceding, when he was alive, availed himself of a fiction of law, it must be altogether consistent with the actual state of the proceedings at that time; and if it had actually been sued out then, it would have been irregular, because there was then a writ of error pending, and no execution could be taken out then, without the leave of the court, *Penoyer* v. *Brace*.*

The SOLICITOR GENERAL and TAUNTON, W. F. shewed cause and, at first, contended, that, upon the death of the *plaintiff* in error, the whole of the proceedings in error were nullified, and, that, therefore, it was

* 1 Lord *Raym.* 244. *Carth.* 404. *Salk.* 319.

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as if there was no writ of error pending when the writ was tested, but by

Lord ELLENBOROUGH, C. J. "In the report of *Penoyer* v. *Brace*, in Lord *Raymond*, the reason given is, that, the *supersedeas* continues until the court be apprized of the abatement of the writ of error by the death of the party, for they ought either to certify the writ of error, or a matter of excuse, which they cannot return unless they themselves are certified of the death of the party which they may be by some entry or suggestion on the record."

TAUNTON then contended, that it appeared from the report of *Penoyer* v. *Brace*,* that the record had been certified, and that according to *Gigger's* case,† there was a distinction, that where error abates by motion, the court must be moved for execution, but it is otherwise, if, for variance, the record is not removed.

Lord ELLENBOROUGH, C. J. "There is an actual stay of proceedings by the writ of error, although it is not returned. How do you understand the expression abatement by reason of variance? In that case there is no cause for the writ of error, for the judge returns that there is no such record."

LAWRENCE, J. observed upon the statement of the case in *Salkeld*, 'that the error had been certified' that it seemed inconsistent with the reasoning of Lord *Holt* in *Raymond*'s report, who says, that the court ought either to certify or send their excuse for not certifying.

RULE ABSOLUTE.

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* 1 *Salk.* 319.

† 1 *Salk.* 265. Action was brought by the name of *Giggeer* and a writ of error was brought as in an action between *Giggure*

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The *plaintiff* then obtained a rule to shew cause why he should not be at liberty to sue out a writ of execution tested of the last term;

And cause was shewn by LITTLEDALE, and

The COURT held, that, a term having intervened, it could not now be done; for that, if the record were properly made up, the death of the party must appear, in order to shew the abatement of the writ of error, and there would be an inconsistency upon the record in suing out the execution pending the writ of error.

RULE DISCHARGED.

The KING *against* WATSON.—8th Feb.

The sessions must find as a fact whether a parish can or cannot have the benefit of the 43 Eliz.

Conviction. Evidence. Day and years.

THIS was a rule to shew cause why an order of sessions, disallowing the appeal of the *defendant* against a rate for the relief of the poor of the township of *Bedlington*, in the parish of *Bedlington*, in the county of *Durham*, should not be quashed for in-

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and the *defendants*; whereas his surname was *Giggeer*; and it was moved that the *defendant* notwithstanding the writ of error, might take out execution; and the court held this was a fatal variance, and that the record was not removed by the writ of error, but would not meddle as to the execution. *Et per Holt*, C. J. Where a writ of error abates by motion, the *defendant* in error must move for leave to take out execution; but where by reason of variance, the record is not removed, he need not move the court for execution: but at last the record was amended.

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sufficiency. The appellant, who was an occupier of lands in the said township, appealed to the sessions against the rate, on the ground that the township of *Bedlington* was not in point of law entitled to maintain its own poor by a separate rate made upon it, apart from the rest of the parish of *Bedlington*; but that the township of *Bedlington*, together with the townships of *Netherton*, *Choppington*, *East Sleekburn*, *West Sleekburn*, and *Camboire*, (all of which townships are situate within the parish of *Bedlington*,) ought to maintain their poor conjointly by one general rate for the whole parish; but the sessions disallowed the appeal, subject to the opinion of this court on the following case:—Previously, and up to the year 1739, the six several townships in the parish of *Bedlington* were united, and the poor of the parish were maintained by one joint and general rate made by the four churchwardens and two overseers appointed for the whole parish, upon the occupiers of rateable property within the same; from 1739 to 1753, it does not appear by what rate the poor of the parish were maintained, or how the overseers of the poor were appointed during that period, but since 1753, to the present time, the parish has been divided into six townships, and the poor of each township have been maintained by a separate rate made upon each respective township, and separate overseers of the poor have been appointed for each township. The parish of *Bedlington* has rather decreased in population; but the decrease has been principally in the township of *Bedlington*; two orders for the removal of paupers have been made, from the township of *Bedlington*, to the township of *Netherton*, dated the 17th of *July* 1798; and the other from the township of *Netherton* to the township of *Bedlington*, dated the 13th day of *November* 1798; which orders

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of removal were acquiesced in. The rental of the rateable property in the township of *Bedlington* appears by the present rate to be 3,905l. 2s. The parish of *Bedlington*, is five miles in length, and three miles in breadth; constables have been appointed in each of the six townships.

Const, in support of the rate stated, the case,

Lord Ellenborough, C. J. "They have not stated that the parish cannot have the benefit of the stat. 43. *Eliz.* c. 2, but that should have been stated; for it is with them to decide on a fact and not for us."

Const then cited *Rex* v. *Leigh*,* *Peart* v. *Westgarth*,† *Rex* v. *Sir Watts Horton*,‡ and other cases to shew that the court have considered it a matter of discretion to be inferred from the facts stated in the case.

Lord Ellenborough, C. J. "If I were to draw the presumption, I should draw the contrary, for up to 1739, it would be clear that, till that time, they could have the benefit of the 43 *Eliz.* c. 2, and it is found as a fact, that the parishes have since decreased in population. I know that, upon that subject, there are different opinions, but I would rather be guided by the words of the act; and the sessions ought to find it as a fact one way or the other, whether the parish could have the benefit of the 43 *Eliz.*"

Lawrence, J. "In the case of the *King* v. *Leigh*, there might have been a way of providing for the poor in the separate townships, immediately after the

* 3 *Term Rep.* 746. † 3 *Burn*, 1610. ‡ 1 *Term. Rep.* 374.

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act, for any thing that appeared in that case, which might give reason to infer, that it never had the benefit of the 43 *Eliz.* But here, it is found as a fact that the poor have always, up to the year 1739, been maintained by the whole parish."

It was ordered that the case should go back to be re-stated.

The KING *against* WOODCOCK.—29th Jan.

Stat. 43 Eliz. c. 2, Separate townships or parishes. Poor rate.

On a conviction before a justice of the peace, it must appear expressly upon the statement of the evidence, that the offence was committed within the time limited for the conviction; and it cannot be supplied by intendment or by information. Therefore, where a conviction stated an information for an offence committed within 3 months last past, to wit, on the 22d of May *last past, and the evidence was stated of a fact committed on the 22d day of* May, *without stating in what year, and without reference to the said 22d day of* May, *to ascertain the year; it was quashed.*

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IN a conviction before two justices for the county of *Suffolk*, the information stated that, before and at the time of the committing of the offence thereinafter mentioned, the *defendant* was a malster and maker of malt, to wit, at *Halesworth*, in the county of *Suffolk*, and so being there such malster and maker of malt, he the said *defendant* within three months now last past, (that is to say) on the 22d day of *May*, now last past, at *Halesworth* aforesaid, in the said county of *Suffolk*, did wet, water, and sprinkle, and cause and suffer to be wetted, watered, and sprinkled, certain corn and grain of him the said *defendant* then and there making into malt in a certain state and stage of

operation, &c. against the form of the statute, whereby he forfeited 200l.; and prayed the judgment of the justices, in the premises; and that the said *defendant* might be summoned to answer the premises, &c. It stated further, that thereupon, afterwards, (to wit), on the 4th day of *June*, at *Woodbridge*, in the said county of *Suffolk*, the said *defendant* having been previously duly summoned, appeared to make his defence in his proper person, and having heard the said information read pleaded, *not guilty*. The conviction then stated the evidence as follows: "Whereupon we the said justices, do now here, at the request of the said informer, proceed to examine unto the truth of the matters contained in the said information, and thereupon, on the day and year last aforesaid, at *Woodbridge* aforesaid, in the said county of *Suffolk*, *William Robinson*, supervisor of excise, and *John Rogers*, officer of excise, two credible witnesses, on the behalf of the said informer, now here appear before us the said justices, and being duly sworn by us the said justices, depose and say in the premises as follows: and first the said *William Robinson*, on his oath aforesaid, for himself saith, that he is a supervisor of excise, and that the said *defendant* at the time of the committing the offence mentioned in the said information, was a maltster at *Halesworth*, in this county, that he with *John Rogers*, on the 22d day of *May*, went to the *defendant*'s malthouse at *Halesworth* aforesaid, where they found a floor of malt then in operation." Here followed the evidence which contained no further intimation of the year, to which the above 22d of *May* referred. And the said *John Rogers* on his oath aforesaid, for himself saith, that he was with the last witness on the said 22d day of *May* at the *defendant*'s malthouse, that he saw the said floor of malt, and has no doubt but it had been watered after taken from the cistern. And the said *defendant* is now here again called upon by

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us the said justices for his further defence in the premises, but no other evidence is now here produced to us the said justices."

ALDERSON objected that the conviction did not state, in the evidence, a fact committed within the time of three months next previous to which time the jurisdiction of the justices was limited.

The SOLICITOR-GENERAL, and FREERE was with him, contended, that, it being stated in the information, that the offence was committed on the 22d of *May* last past, and the evidence stating, that the fact was committed on the 22d day of *May*, it must be presumed to be the same 22d day of *May*, mentioned in the information, and that it must also be presumed that the evidence given applied to the time stated, and that in order to shew that the justices had not jurisdiction, the *defendant* ought to shew clearly from the conviction, that it was impossible that the evidence could apply.

Lord ELLENBOROUGH, C. J. "It does not say 'on the same 22d day of *May*,' so as to refer to the information. Then your information is within 3 months last past, but, for any thing that appears, your evidence is not even within a year. Here is no specific allegation of the year at all, and no reference whereby to ascertain what year is meant, and *non liquet* upon this statement, but they had evidence of a fact committed on the 22d day of *May* 1805."

LE BLANC, J. "It does not appear on the face of the conviction, that the evidence supports the information; for the fact which is stated of an offence committed on the 22d of *May*, will support a conviction for any other year than the year 1805."

Et per curiam.

THE CONVICTION QUASHED.

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SPENCELY *qui tam against* DE WILLOT.—27th Jan.

*On cross examination to try the credit of a witness, held that only general questions can be put, or such as relate to the issue in question; and he must not be examined as to particular and distinct facts, collateral to the issue, in order, if he mis-state them, to contradict him by another witness.**

Cross-examination. Credit of Witness.

SPENCELY qui tam *versus* DE WILLOT.

THIS was an action for usury on a contract of loan between the *defendant*, and one *de Chambonas* an emigrant *French* marquis. At the trial before Lord ELLENBOROUGH, C. J. the Marquis *de Chambonas* was the principal witness and stated the contract by way of loan at usurious interest, and his evidence went clearly to prove the *plaintiff*'s case.

ERSKINE for the *defendant*, asked him what representations he had made to one *Schullemberg*, as to the money advanced by him *Schullemberg*.

Lord ELLENBOROUGH, C. J. held this question inadmissible. The witness said that the money advanced by the *defendant*, was not upon the same terms. The object of the question was to try the credit of the witness; for it was stated to be the fact, that *Chambonas* had represented to *De Willot, Schullemberg* and others, that he had means of em-

* I have used the words general questions, here, because I find them upon my notes as attributed to LAWRENCE, J. but I do not precisely understand, whether his lordship meant to say, that general questions might be put to a witness in cross-examination or that his evidence was to be discredited by general evidence of incredibility, i. e. by general questions put to other witnesses as to his credibility. See my note of the opinion delivered by LAWRENCE, J. *post.* page 291.

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ploying money in mercantile speculations, by which he could make large profits, and upon this speculation they advanced several sums to him upon an agreement to share the profits. An action was brought for usury against *Schullemberg* also, and if he misrepresented the fact as to *Schullemberg*, it was intended to call him to discredit the witness by contradicting him; or if he stated that the contract was the same, it would appear that there was no usury. The *plaintiff*'s counsel put in a latitat and affidavit of debt by *De Willot* against *De Chambonas*, on which the latter was arrested as for money lent, to shew that he had considered it as a loan; but ERSKINE intended to meet this by shewing that the money was to be repaid at all events, but the amount of the gain, or whether there was to be any gain at all, was to depend upon the amount of the profits made. The *plaintiff* obtained a verdict for 25,000l. damages, and upon ERSKINE moving for a rule to shew cause why there should not be a new trial, on the ground of the rejection of this evidence, or the refusal to go into the cross-examination upon this point, the court refused the rule as to that particular, although it was granted as to another point, which went upon the unduly influencing of the jury, by distributing a certain memorial in court, previous to the trial.

Lord ELLENBOROUGH, C. J. "I do not feel that we can grant the rule on the first ground. We cannot try all these cases in one cause. There were several actions for usury by the same *plaintiff* against several emigrants, and *De Schullemberg* was one. His cause stood next in the paper. The witness said that the contract between him and *De Willot* differed from that made with *Schullemberg*; the question can therefore tend to prove nothing relative to the issue, and, if we are to examine the witness as to other causes, in

order to try his credibility, we must at the same time try all the other causes on one issue. All the contradiction in his testimony was left to the jury."

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LAWRENCE, J. "If it was the same contract, it should be put so; but the question was not in that form. If it was another contract to try his credit, then it could not be put at all. I think it has been solemnly decided, that any question to try the credit of a witness must be a question arising out of the cause, or it must be a general question. If it is not considered as decided, it is fit that it should be so in the most solemn way."

Lord ELLENBOROUGH, C. J. then added, that he had so often decided the point at *Nisi Prius*, that he was tired of it, and wished, that, in future, a bill of exceptions might be tendered, in order to put the question at rest.

RULE NISI REFUSED, *quoad hoc.*

DOE on the demise of COOK and ELIZABETH his wife in right of the said ELIZABETH *against* DANVERS.—*February* 12*th.*

T. T. possessed of a customary estate, parcel of the manor of S., held of the lord of the manor according to the custom of the manor demiseable by copy of court-roll, to which she was admitted on payment of a fine, saving the right of the lord, and which she surrendered to such use as should be declared by her will in writing, and of which she had granted a lease for forty-one years, upon license by the lord, devised the same by the description of "all that copyhold messuage at S. to Mary C. wife of C." The devise was contained in a paper of instructions written by her attorney in her presence, for the purpose of preparing a formal will, but which was not signed by her, she dying before the will could be prepared, in 1780. *The paper was proved as a will in the Ecclesiastical Court in*

Copyhold. Customary estate. Statute of limitations. Descent tolling entry. Statute of frauds. Trust wheat. Will in writing Custom to devise. Ejectment. Misnomer of devisee and Misdescription of estate in devise. Forfeiture.

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1782. *Her heir was admitted to the estate as heir, in* 1782, *and, upon his death, his son, also in* 1791; *and they received rent upon the lease till the expiration thereof in* 1800. *After which,* Elizabeth, *not* Mary Cook, *the actual devisee, was admitted as devisee and brought ejectment. The lease contained a clause of re-entry for non-payment of rent, and a forfeiture was committed by the tenant, twenty years before ejectment brought. Held as follows: The freehold of this customary estate is in the lord, though it is not held* ad voluntatem domini, *and it may well pass by the description of copyhold in a will, if the intent be so, whether strictly copyhold or customary freehold. It is not within* 39 *Car. II. c.* 3, *s.* 5, *nor within the* 7*th and* 9*th sections, where the words 'by will in writing' mean a will of lands, as in section* 5 *attested by three witnesses. A will directing the use of a copyhold or customary estate, is neither a declaration nor an assignment of a trust within that statute; for, there is no separation of the legal and equitable estate, which is essential to a trust. Such customary estate passes by the surrender and will according to the custom, and such a paper in writing proved in the Ecclesiastical Court, is a good will in writing under the custom, by analogy to the cases upon the statute of wills,* 34 *H. VIII. Also, the receipt of rent for twenty years, under the lease granted by the testatrix, is no adverse possession to bar the entry of the devisee under the statute of limitations,* 21 *Jac. I. c.* 16, *and the time begins to run against her, only when the lease expires, for, till then, she could not bring ejectment or enter, and she was not bound to enter for the forfeiture. Neither did the descent from the heir of the testatrix to his son, during the lease, toll the entry; for the entry is not tolled where the only remedy is by entry, as in the case of a devise, nor where the estate of freehold is in the lord. Held also, notwithstanding the misnomer of* Mary *for* Elizabeth, Elizabeth *shall take under the devisee, if the jury find that* Elizabeth *was the devisee meant by the testatrix.*

Doe dem. Cook versus Danvers.

THIS was an action of ejectment to recover the possession of a house and premises situate in the parish of *St. Dunstan's, Stebunheath,* otherwise *Stepney,*

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in the county of *Middlesex*. The declaration was entitled of *Hilary* term, 42 *Geo. III.* 1802, and was upon two demises by *Mark Cook* and *Elizabeth* his wife, in right of his said wife; the first demise being laid upon the 1st of *July*, 1800, and the second upon the 1st of *January*, 1802; and at the trial of this cause before the Lord Chief-Justice, the following facts were admitted and a verdict was found for the *plaintiff*, subject to the opinion of the court on the following case:—The premises in question are parcel of the manor of *Stebunheath*, otherwise *Stepney*, in the county of *Middlesex*. At a court held for the said manor, on the 12th day of *April*, 1748; *Thomazine Taylor*, spinster, was admitted to the premises in question, by the description of "all that *customary messuage or tenement*, with the appurtenances on the south side of *Ratcliffe Broad-street*, late in the occupation of *Chandler Butcher*, to have and to hold the said premises, with the appurtenances unto the said *Thomazine Taylor*, her heirs and assigns for ever, of the lord of the said manor by the rod, according to the custom of the said manor, by the rent, suit of court, customs, and other services thereof, heretofore due and of right accustomed;" and she gave to the lord for a fine for such her estate and entry into the premises 1l. 5s. and fealty was respited; and so, saving always the right of the lord, the said *Thomazine Taylor* was admitted tenant thereof in form aforesaid. At the same court, the said *Thomazine Taylor*, according to the custom of the manor, surrendered (amongst others) the premises in question, into the hands of the lord of the said manor, by the description of all and singular her customary messuages, tenements, cottages, lands, and other hereditaments whatsoever, held of the lord of the said manor by copy of court-roll with their and every of their appurtenances to such uses, intents, and purposes as the said *Thomazine Taylor*, in or by her

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last will and testament in writing, should limit, appoint, or declare. The court books of the manor of *Stepney*, now in existence, commence in the year 1654. They contain entries of admissions of all the tenants admitted to the premises in question between that period and the 3d of *May*, 1791; which are all in the same form. The *habendum* of these entries is also in the same form as that already set forth in the admission of *Thomazine Taylor*, and the admissions are severally followed by entries of surrender by the new tenants to the same uses and in the same form as is already set forth in that entry; and other tenements of the manor appear to have passed by grants similar to the foregoing from the commencement of the rolls. "*Thomazine Taylor* by indenture of lease of the 7th day of *June*, 1759 (by virtue of a previous license from the lord) demised the premises in question to *Dorothy Whiting* (since deceased) for 41 years from *Midsummer* day then next at the rent of 8l. per annum, payable quarterly on the usual rent days, and subject to the following proviso for re-entry in case of non-payment; provided always, that, "if it shall happen the said yearly rent of 8l. or any part thereof, shall be behind or unpaid, in part or in all, by the space of twenty-one days, next over or after any of the said feast-days or times of payment on which the same ought to be paid as aforesaid, or if all and every of the defects, decays, and wants of reparations, which shall from time to time be found upon any such view, in or about the said demised premises, or any part thereof, be not well and sufficiently repaired or amended within the time [illegible] space of three months next after any such notice or warning in writing, left or given as aforesaid, or if the said *Dorothy Whiting*, her executors, administrators, or assigns, do not well and truly observe, perform, and keep, all and every the covenants, grants, articles, and agreements herein contained, which, on her and

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their parts and behalfs, are or ought to be observed, performed, and kept, that, then, and from thenceforth, and at all times afterwards, it shall and may be lawful unto and for her the said *Thomazine Taylor*, her heirs or assigns, into and upon the said hereby demised premises, or into any part or parcel thereof, in the name of the whole, wholly to re-enter, and the same to have again, re-possess, and enjoy, as in her and their first and former estate." The lessor took possession of the premises under this lease, and she and her representative Mr. *John Scott Whiting*, the present tenant in possession, continued to occupy them from the commencement of the lease until the expiration of it at *Midsummer*, 1800. On the 3d of *August*, 1780, Miss *Taylor*, the lessor, gave directions to her attorney to prepare her will, and he accordingly wrote down the following instructions for it, and was desired to attend her therewith the following morning at eleven o'clock, to have it executed: "*Thomazine Taylor*, of the parish of *St. Mary, Rotherhithe*, com. *Surrey*, spinster, by her will gives to *John Noble*, the father, in trust for *Richard Noble* and *Thomazine Noble*, all that messuage or tenement, situate on *Fish-street Hill, London*, in trust for his two children until their ages of twenty-one years; all that copyhold messuage or tenement, situate in *Ratcliffe Highway*, within the manor of *Stepney*, to *Mary Cook*, wife of —— *Cook*, and to her heirs for ever, (no surrender to use of will ever made;) all the residue to *John Noble*, absolutely. To be buried in the vault under *Limehouse* church, where my uncle and aunt *Mervin* lie; and appointed the said *John Noble* sole executor; to Mr. *Francis Mason* my best diamond ring of the value of 50*l*." Before any will was formally prepared by the attorney under these instructions, viz. upon the said 3d of *August*, 1780, Miss *Taylor* died, leaving *Thomas Danvers*, father to the present *defendant*, her heir at law. These instruc-

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tions were, upon the 25th of *February*, 1782, pronounced for and established as the only will of Miss *Taylor*, by the Prerogative Court; and probate thereof was afterwards granted accordingly. Upon the 21st of *June*, 1782, the said *Thomas Danvers*, was admitted to the premises in question, as heir at law of the said *Thomazine Taylor*, in the accustomed form above set forth; the rent was paid to the said *Thomas Danvers*, from the time of Miss *Taylor*'s death until the death of the said *Thomas Danvers*, in *January*, 1791, from that time until the expiration of the lease to his son *James Danvers*, the *defendant*, who upon his father's death was admitted the 3d of *May*, 1791, to the estate, as his heir at law, in the same form as his father was admitted, and, upon the expiration of the lease, made a new demise to Mr. *Whiting*, under which the latter held and paid rent as tenant to the *defendant*, at the time of the demise laid in the declaration. The lessor of the *plaintiff*, *Elizabeth*, was admitted to the premises in question upon the 1st of *December*, 1801; to hold, to her and her heirs, of the lord, according to the form of the entry before set forth, her marriage with the other lessor was proved at the trial, and it was also proved that the testatrix had no relative of the name of *Cook*, except the lessor of the *plaintiff*, *Elizabeth*, and that she was the person who was intended to take by the name of *Mary Cook* as described in the instructions of the 3d of *August*, 1780. The question for the opinion of the court is, whether the lessors of the *plaintiff* are, under the above circumstances entitled to recover.

This case was twice argued at great length, first, by Lawes, for the *plaintiff*, and Nolan, for the *defendant*, in *Trinity Term*, 1805; and secondly, by the Solicitor-General for the *plaintiff*; and Marryat for the *defendant*, in *Michaelmas* term last.

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Lawes, for the *plaintiff*, on the first argument, contended, that this estate was copyhold, and as such passed under the will of *Thomazine Taylor*, which, though not attested by three witnesses, was, notwithstanding, a will in writing and within the custom of the manor. After premising that all the cases on the question whether copyhold or freehold, were cited in *Doe dem. Smith* v. *Smith*,* and *Roe* d. *Conolly* v. *Vernon*,† in the former of which the chief difficulty was, that the will was not proved, whereas, in this case, the testamentary paper was pronounced to be a will; the estate in question constitutes *parcel of the manor*, which is alone sufficient to constitute a copyhold; all customary freehold being only said to be *holden of the manor*, *Brittel* v. *Bade*,‡ *Crouther* v. *Oldfeild*.§ Then, if it be copyhold, it is not necessary that a will of copyhold lands should be attested in the presence of three witnesses; *Attorney-General* v. *Barnes*,¶ *Carey* v. *Askew*,‖ *Attorney-General* v. *Andrews*,** *Wagstaff* v. *Wagstaff*,†† and *Tuffnell* v. *Page*.‡‡ If it is a customary freehold, the legal result will be the same, for that no more passes by a will than a copyhold, but by the surrender, and is not within the statute of wills, 32 *H. VIII.* c. 1, s. 1. For, although the words of that act are general, yet they are explained by the 34 and 35 *H. VIII.* c. 5, s. 3, which is to obviate doubts on the words, 'estate of inheritance,' and which 'words seised of estates of inheritance' it is declared shall be taken of estates of *fee-simple* only.

* This is a case which was very lately argued. It is not reported; I have notes of it, but it is not decided.

† 5 *East*. 51, 75, and *Smith's Rep.* 318. ‡ 1 *Lord Raym.* 43. § 1 *Salk.* 364. ¶ 2 *Vern.* 597. ‖ 2 *Brown's Chan. Ca.* 59. ** 1 *Vezey*, 225. †† 2 *Peere Will.* 258. ‡‡ 2 *Atk.* 37.

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As to which point the opinion of Lord *Hardwicke* in *Tuffnell* v. *Page* is express.

Then if this land is copyhold, and passes by the will there being a surrender to the use of the will, there has not been such an adverse possession, within any of the cases upon the statute of limitations, 21 *Jac. I.* c. 16, to oust the lessor of the *plaintiff* of the remedy by ejectment; for he had no right to enter, until after the outstanding lease granted by *Thomazine Taylor* was expired. The title to the possession, till then, continued in the tenant; he had the legal possession during the lease, and the lessor of the *plaintiff* could not bring an ejectment during that term; nor was he bound to take advantage or condition of the forfeiture and re-entry for non-payment of rent. *Orrell* v. *Maddox*.*

Nolan, *contrà*, for the *defendant*, upon the question being put by Lord Ellenborough, C. J. whether there was a clause of re-entry in that case of *Orrell* v. *Maddox*, observed that there was not, and added that if the case should turn upon, whether it was parcel of the manor or not, he hoped his client would not be concluded by it, because the counsel in settling the case had agreed, that it should come before the court upon the facts of the admissions merely, to save expence to the parties, and, that it would be necessary, if it should be determined upon that point, to have the verdict of the jury upon the fact, after producing before them all the court-rolls; upon which

Lord Ellenborough, C. J. observed, that they would not be driven to that point merely.

He then took four objections; *first*, that this is not a copyhold but a customary freehold, and cannot pass

* *Runnington on Ejectment. Appendix, p.* 458, last edit.

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except by a will attested by three witnesses under the statute of frauds, 29 *Car. II.* c. 3, s. 5; or *secondly*, supposing it not to be within that clause, that it is within the other branch of the statute, and the testamentary paper must be signed by the parties as a declaration of trust in writing under 29 *C. II.* c. 3, s. 7; *thirdly*, supposing it to have passed by the will, the lessor of the *plaintiff* is without remedy, because he is barred by the statute of limitations, either by the adverse possession of the *defendant* and his father, and their receipt of rent for more than 20 years since the death of the testatrix, or by not having taken advantage of the right of entry for non-payment of rent; and *fourthly*, that there was a descent which tolled the entry. *As to the first point*, this is customary freehold, although it is stated to be held by copy *of court-roll*, for, to render it copyhold, it must be added that it is holden *ad voluntatem domini*, *Roe* dem. *Conolly* v. *Vernon*,* *Hughes* v. *Harry*,† *Gale* v. *Noble*,§ *Crouther* v. *Oldfeild*.§ Then, if the freehold is in the tenant as it is in customary estates, and not in the lord as in copyholds, the first statute of wills as explained by the second, does apply to such customary estates; and this estate passes under the will and not by the surrender merely, and falls within the statute of frauds, and is within the reasons assigned by Lord *Hardwicke* in *Tuffnell* v. *Page*. That case has been questioned, although it cannot now be overturned; but it is said that it should not be carried further, and it only extends to copyholds. *Hussey* v. *Grills*,¶ was a case of a customary freehold, and it was there held, that it did not pass by the will; but the reason assigned there does not exist in this case, for in that case, it was said, there was no custom

* *Ut supra* (*where all the cases are collected.*) † *Cro. Car.* 229. ‡ *Carth.* 32. § 1 *Salk.* 354. ¶ *Ambler*, 290.

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to warrant the surrender to the use of the will, nor could the lands be so surrendered. The inference from which is, that they would pass by the will, if there was such a surrender and a custom to surrender; both of which are found in this case. In 11 *Mod.* 53, it is said where a custom is, that all lands held of a manor shall pass by grant and admittance, yet they may be freehold; *Rogers* v. *Bradley*.* *As to the second point on the statute of frauds*; it is argued, that this is not within the statute of frauds relating to wills, because it is not within the statute of wills. But that statute as explained by the 34 and 35 *H. VIII.* does not exclude this estate; for it is an estate of *fee-simple* of inheritance."

Lord Ellenborough, C. J. "Can we decide without having it found specially, whether there is a custom of devising by surrender and admittance? There is evidence enough from which a jury might find the custom; but, though it is stated, that it was surrendered by the custom, yet that is not the correct way of finding. After examining the case, it was thought that, as it was not necessary to have the case stated as particularly as upon a special verdict, there was sufficient from which to infer the existence of the custom, and it was agreed that the court should see the court-rolls, if from them it should appear that the inference could be repelled."

Nolan. "Though it cannot now be contended that a will of copyholds, *qua will*, should be attested by three witnesses under the statute of frauds, yet the surrender to the use of the will creates a use or confidence of which the will, afterwards, declares the use, or amounts to an appointment or assent under it; and will therefore require to be signed by the party, under

* 2 *Ventr.* 143.

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the ninth section of the statute of frauds, 29 *C. II.* c. 3. The 5th section of that statute, relates to wills which pass lands under the statute of wills. Section the 7th, relates to express declarations of trust or confidence, and enacts that 'declarations of trust or confidence of any lands shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, *or by his last will in writing*; or else shall be void.' The 8th section applies to trusts by implication of law, which are excepted. And, by section the 9th, the assignment of any trust or confidence shall likewise be in writing, signed by the party, or by such will. Such will must be a will in writing signed by the *party*, or a nuncupative will under the statute, which does not fall within the same inconvenience, because that is confined to property of 30l. value."

Lord Ellenborough, C. J. Lawrence, J. and Le Blanc, J. observed that the word 'such' was not in the 7th section. It did not, therefore, require a will signed and attested by three witnesses, but merely a will in writing; that by the 9th section the words 'such will' could only refer to the last antecedent 'will' namely, a will in writing under the 7th section; but if the word *such* had been contained in the 7th section, the inference would follow, that it must be attested by three witnesses. By the terms of the surrender however it must be a will in writing.

Nolan. "All the older cases expressly state that the will should not only be in writing, but signed by the party. The words of the report in 2 *Barnadiston*, of the case of *Tuffnell* v. *Page*, are that the will must be in writing, 'then its being signed by the party will be sufficient;' So in *Roe* v. *Heyhoe*,* Lord C. J.

* 2 *Black.* 1114.

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De Grey says, it was signed by the testator, this therefore is a sufficient will. It seems therefore to have been the general opinion of the judges, that it should be signed. As *Carey* v. *Askew*, is reported, in the notes to *Peere Williams* that case is against the necessity of signature, but as the statement stands in the text of the report, in *Brown*'s Cha. Ca. it might have been signed.

LAWRENCE, J. "You say that it was signed in that case; you may easily ascertain the fact by searching the register books."

NOLAN, then cited *Doe* d. *Tempest* v. *Dancer*.* In which case LAWRENCE, J. observed that Lord *Kenyon*, said, he felt that there was much force in Mr. *Scott*'s argument that a copyhold estate would not pass by a codicil not attested. There was no decision however in that case. Then, as to the question upon the statute of limitations, and whether the descent tolls the entry; *John Danvers* was admitted in fee and received the rents and profits; he died, and the *defendant* was admitted on his death, and has continued ever since in possession. If this were not the case of a will, it is clear that there was a descent cast and the entry thereby was tolled. *Co. Litt.* 240, s. 392; and *Matheson* v. *Trott*.† In one of the latter reports of the case, however, it is not stated that the descent is not tolled where there is a devise; but the case is put upon a different ground, and it is denied that there was a disseisin and that the heir was ever in possession, and that is the ground relied upon in *Taylor* v. *Horde*,‡ where it is said that the ancestor had been in possession but never was seised and there was no descent. But here as the party cannot claim by the devise, but must claim by the surrender, for otherwise the will must be duly attested, it operates

* *M. S. Vide Post.* † *Owen*, 141, 1 *Leon.* 209. ‡ 1 *Burr.* 60.

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as if there were no will, and the entry is tolled. *Then is the plaintiff barred by the statute of limitations,* 21 *Jac. I.* c. 16.? This suggests two points; first considering the estate as copyhold, and secondly, considering it as freehold. The words of the statute are that 'no persons shall make an entry into lands, but within 20 years after their right or title shall first descend or accrue to them;' and it operates in two ways, first as a bar to the *plaintiff* if he does not enter within the time; and secondly as a title to the *defendant,* if he has been in possession for twenty years. *First,* as a copyhold: the admittance is the investiture of the tenant to the copyhold, and if a copyholder has a right or title to that admittance, the whole seisin is barred, if he does not claim to be admitted within twenty years. And that the statute of limitations applies to copyholds is clear from *Bro. Abr. Limitations, pl.* 2, which cites 6 *E. VI.*, upon the old statute of limitations, and also *Shaw* v. *Thompson,** and *Roe* d. *Tarrant* v. *Hellier,*† upon the new statute. The admittance is his right or title to the entry which he ought to make within the twenty years; as such, his admittance ought to be within twenty years."

Lawrence, J. "Entry, in the case of an heir, will do without admittance to claim the title."

Nolan. "I confine the doctrine to a devisee, whose admittance will entitle him to all the effect of an entry so that he might have distrained for the rent without attornment, before the statute which rendered attornment unnecessary *Swinnerton* v. *Miller*;‡ for admittance is the act in law which puts the estate in the party, as in the *post*; *Coke's Copyholder,*§ and in

* *Moor*, 410. † 3 *Term. Rep.* 162. ‡ *Hob.* 177.
§ *p.* 87, *s.* 39.

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the case of a devisee nothing passes until admittance, the surrender being only the manifesting of the grantor's intent, and till admittance the lord taking notice of the grantor as his tenant, *Roe* v. *Hilks.** Here, the *defendant* is the heir at law in whom the right to the rents and profits vests, nothing passing to the devisee, till admittance. The heir is admitted on the 21st of *June*, 1782, and it is found that he received the rents and profits from the death of the testatrix; more than twenty-two years previous to the time of bringing this action of ejectment. Here is then a complete adverse possession in the *defendant*. He has the title to the possession; the *lessor* of the *plaintiff* has none. The *defendant* has the complete legal interest, which eighteen years ago he reduces into possession; he receives the rent of the tenant for more than twenty years, and this receipt of the rent is the possession of the tenant to him. Although there is no case in law to that effect, yet in equity, where the purchaser of a copyhold, before admittance, died, and devised it, and his wife was afterwards delivered of a posthumous daughter, and the devisee thinking the devise was void, suffered her to be admitted, and after twenty years brought his bill; it was said, that, had he come in time, he might have had a decree, but after twenty years, and paying rent so long, he is too late, *Davy* v. *Beardsham*.† *Secondly*, if this is a customary freehold, the *plaintiff* is barred of his right of entry by not having entered within twenty years, notwithstanding the possession of the tenant might have been set up against him in ejectment. For there are several entries into land, for which there is no remedy by ejectment; it being necessary that in ejectment there should be an actual ouster of the pos-

* 2 *Wilson*, 16.

† 2 *Cha. Ca.* 39. 3 *Cha. Rep.* 4, *cited in* 9 *Modern*, 75.

session as well as an entry. And there are many entries competent to the landlord, this being only a lease for years, for which not even trespass will lie; as an entry to demand rent or fealty; which latter still exists. He might have entered to obtain seisin of the freehold, and not having entered to demand the seisin of the freehold within twenty years, he is barred."

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Lawrence, J. "How do you mean to demand seisin of the freehold? Is it to do that act upon the lands which amounts to *seisin*? Have you any case for that, to shew that the tenant could not maintain trespass?"

Nolan. "*Taylor* v. *Horde*, lays down that, as by the old law there might have been a tenant to the freehold, and a tenant in possession, the latter was merely the covenanted bailiff of the tenant of the freehold; and at those times the tenant of the freehold could not by his lease have ousted himself of his right to enter to obtain seisin, because he would have barred the lord of his *feodal* rights."

Lawrence, J. "He might have entered to view waste; but are these any of the entries spoken of in the statute; does not that mean an entry to get possession?"

Nolan. "I construe the statute that he should make entry to justify his title. Otherwise a lease for 1000 years will preserve the entry, and this consequence will happen; the lessor in such a case might not be in possession for sixty years; but a disseisee in a writ of right must count on an actual seisin, which is a matter distinct from possession: then he, the lessor, might recover upon an ejectment for that to which he could not *refer the right*, and the next day

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the person ejected might on a writ of right, count on his seisin and recover the land. That *seisin* is distinct from possession is clear from *Taylor* v. *Horde*, which states that a mere entry does not operate as a *disseisin* to make a good tenant of the freehold.

Lawrence, J. "That only means that trespass is not disseisin."

Nolan. "In *Co. Litt.* 249, cases are put of *disseisin* of the freehold which shall be no ouster of the termor, *Litt.* 411, a; so if I let unto a man certain lands for the term of twenty years, and another disseiseth me, and oust the termor and die seised, and the lands descend to his heir, I may not enter; and yet the lessee for years may well enter, because that by his entry he doth not oust the heir, who is in by descent, of the freehold which is descended unto him; but only claimeth to have the lands for term of years, which is no expulsion from the freehold of the heir, who is in by descent. Which sufficiently shews, that there may be a claim of the freehold, notwithstanding the term."

Lord Ellenborough, C. J. "There is no disseisin unless you claim to be seised as tenant to the lord in the place of the person who is disseised."

Nolan. "Seisin is said in *Taylor* v. *Horde*,* to be a technical term to denote the completion of that investiture, by which the tenant was admitted to the tenure, and without which no freehold could pass." And it is laid down that recovery in ejectment is no *disseisin*.† So if the lord enter for the purpose of being seised, he does not disturb the possession of his tenant further than is consistent with the nature of the term.

* 1 *Burr.* 107. † 1 *Burr.* 111, 113.

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Formerly it would operate as an *ouster* of the lessee; but now he will be entitled to possession under his lease."

Lord Ellenborough, C. J. "*Disseisin* is a personal trespass, a tortious ouster of *seisin*; it is therefore a trespass on the person entitled to the freehold estate. Can you shew, that the lessor of the *plaintiff* could have entered without being a trespasser on the termor, who has a title to hold under the ancestor; for the law does not require a man to do that which would make him a trespasser."

Nolan. "The old law might require that he should; for he would be a wrong doer in not entering to give the lord investiture of the feudal tenure. In the time of *Charles II.* before the feodal tenures were abolished, a termor was considered merely as a covenanted bailiff. For this purpose he must be so considered still. And to this day, in copyholds there is a symbolical delivery of the lands by the verge, and every time a man is so invested, he is not prevented by a long lease from taking the investiture of the tenure; so, in the case of an incumbent of church lands which are leased for a long term in pursuance of the enabling statutes; when the incumbent dies, the investiture of the freehold, by the investiture of the parson in the church, is effected, notwithstanding the lease."

Lord Ellenborough, C. J. "The investiture of the incumbent is by giving him the key and handle of the church-door, which gives the whole parsonage. You must shew that the lessor of the *plaintiff* is obliged to distrain, or to re-enter for non-payment of rent."

Nolan. "It must be admitted that this argument is directly against the case of *Orrell* v. *Maddox*; but I must contend, that he must enter or receive the

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rents and profits. Then he might be put to bring a writ of entry or of right of such a kind, in which the judgment is only *quod obtinet seisinam suam*, and which will not affect the possession." He then cited several in which the party did not claim title to the possession. "If any other construction is given to the statute than that which compels the freeholder to recover his seisin within twenty years, notwithstanding an outstanding term, a party will be absolutely deprived of his writ of right, by such a term being granted for seventy years only. For, if this is a bar to recovering seisin by writ of entry during the time of the lease, the demandant cannot say that he was seised during that time."

Le Blanc. "That is, supposing the freeholder not to be seised by the possession of his ancestor's lessee, or by the receipt of the rents and profits."

Nolan. "Since the statute of attornments, the receipt of the rents and profits will be seisin; but where there is no receipt of the rents and profits, the tenant cannot demand upon a seisin in himself, if this rule is to apply that the entry is to be suspended during the term. And in most cases of a writ of right the demandant avers a seisin by taking the *esplees*. If it be necessary to make an entry for the purpose of maintaining his right to the land, the lessor of the *plaintiff* might justify upon that ground, in an action of trespass. The taking of the rents and profits is an adverse possession, and has been so held in all the cases which have been decided upon the question of whether there has been an adverse possession between two joint-tenants or two tenants in common; *Doe* d. *Fisher* v. *Taylor*."*

Lawes, in reply. "The doctrine of a descent tol-

* *Cowper*, 217.

ling the entry does not apply either to the case of a copyhold or to that of a will where the party claims under a devise, because there he has no remedy but by entry; and for the same reason which applies to copyholds, there can be no descent tolled of customary freeholds, because the interest of the lord is concerned."

The Solicitor General upon the second argument, for the *plaintiff*, after noticing the objections taken by Nolan as above; "Whether this be customary freehold or copyhold land is very little material to this question. *Blackstone*, in his treatise upon the subject, considers that the freehold is in the lord, and that they are only privileged copyholds, and of the same opinion is *Bracton*, lib. 2, c. 8, s. 2, who says, *Non habet potestatem transferendi, cum liberum tenementum non habet, sed dominus:* and in the case of *Stephenson* v. *Hill*,* which was a case of customary tenement held *secundum consuetudinem manerii*, the court held that the freehold was in the lord, and that the tenant could not prescribe as a freeholder; and Lord *Mansfield* says, 'What signifies the custom; clearly the freehold is in the lord, and it is even stronger than the case of copyholds.' Here, if any proof was necessary, the lease itself was made with a license from the lord, who could only be required to give his licence in respect of the freehold being in him. Then, as this is property which passes by surrender and will, it is clearly not within the statute of frauds, so as to require attestation by three witnesses."

Lord Ellenborough, C. J. observed upon the point, whether it was a customary freehold or a copyhold, that it might be immaterial, for it might be

* 3 *Burr.* 1273.

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like a copyhold for this purpose of passing by the surrender.

The Solicitor General. "It is said that, although this will is in writing, it must be signed by the party, because it is a declaration of trust; but a declaration of trust is where the legal estate is in the trustee, and the equitable estate is in him who creates or declares the trust, but this will passes, not merely the trust or equitable estate, but the legal interest."

Lawrence, J. "In *Tuffnell* v. *Page*, in *Barnardiston*'s report, Lord *Hardwicke* says, 'So far indeed is necessary that it should be in writing; but if it is in writing and signed by the party, that is sufficient."

The Solicitor-General. "That is a peculiar mode of expression, which does not plainly intimate that it should necessarily be signed by the party."

Lawrence, J. "Can you conceive that the statute meant to say, that if a man takes under a declaration of a trust, he must have a signature of the party; but, if he takes under a will with trusts, he need not. In *Doe* d. *Dancer* v. *Tempest*, the question was, whether copyholds, purchased after the making of a will, passed by a codicil republishing the will which was not signed by the party. It was apparently held that it would not; although Lord *Kenyon*, C. J. recommended the parties to compromise. The case occurred in 1796, Mr. *Scott* was on the one side, and the *Solicitor General* (then Mr. *Gibbs*) for the other. Lord *Kenyon*'s note upon the case is, that the argument on the 7th section of the statute of frauds is strong on the parol acknowledgment of a prior declaration in writing, that the object of the statute was to obviate the mischiefs arising from the evidence of loose conversation.* In the *Attorney General* v. *Andrews*,† Lord *Hardwicke*

* *Mr. Tarrant* was mentioned as the attorney in the case, from whom possibly some information might be acquired as to the papers. † 1 *Vesey*. 225.

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is made to say, that copyhold lands are not within the statute of frauds; *standing on the statute of Hen. VIII.*; whereas it is perfectly clear that they are not within that statute. Here must be some mistake.

The Court then intimated, that this appeared the only difficult point in the case, and that, if it should be necessary, they would call for another argument as to that point only.

MARRYAT, *contrà*. "As to the question upon the statute of limitations; the entry must be made within twenty years after the right or title accrues, and there are many exceptions expressly stated in the statute, but this of an outstanding term is not one. And if the party cannot prosecute his claim by ejectment, he must resort to his real action by writ of right or writ of entry, but he must proceed within the twenty, the thirty, or the sixty years. The party accepts seisin from the lord, and could not plead *non tenure* in a real action."

LAWRENCE, J. "There are remedies to enforce the payment of rent under the statute of attornments, but he could not have entered. The question is, whether he could have entered? Could he have entered and made a lease to another man; the statute says, that he must enter."

MARRYAT. "It must be admitted, that he would have been nonsuited upon an ejectment, but he must proceed to obtain the investiture of the tenure by some other mode. The case of *Orrell* v. *Maddox* is distinguishable; for the question there was, whether the *plaintiff* should in the first instance prove the receipt of rent within twenty years by herself or her ancestor, and it was held not to be necessary; but here the question is very different, for it is actually proved that the *defendant* has received rent for twenty years." He then mentioned another case, of which I took the fol-

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lowing note, as he stated that it was not in print, but referred for some account of the facts to the parliamentary cases, and also to *Frazer's Election Reports*, p. 87, before the *Horsham* Committee. "*Onslow* v. *Thornton* and *Smith*, tried at *Sussex*, 1793: There was a verdict for the *defendant*, and then a motion for a new trial, which being granted, the *plaintiff* failed and brought a writ of right. *Onslow*, 10th *Nov.* 1699, granted a lease to *Waterton* for 1000 years at 1s. 6d. rent. He or his descendants paid rent to 1783; several years were paid at a time. *Thornton* was in possession for above twenty years, and had paid no rent to *Waterton* nor to the *Onslows*. *Waterton* paid rent to the *Onslows* till 1783, but how *Thornton* came into possession did not appear. The *Onslows* never entered during their term of 1000 years; 22d of *April*, 1791, *Waterton* surrendered the residue of the term to *Onslow* for three guineas, and he brought his ejectment. I contended before Hotham, J. that as the title accrued on the surrender of the term, till that happened he was in no situation to bring his ejectment. The demise was laid a few days short of the date of the surrender; he had received rents from *Waterton*, and *Hotham* was of opinion that we were entitled to recover. There was a motion for a new trial; of which I can obtain no account. But the event of the motion was, that the court granted a new trial, and the *plaintiff* failed in his ejectment; whether he went down to trial or abandoned it, I do not know, but I afterwards drew the proceedings in a writ of right, for Mr. *Onslow*, and after some delay the tenant died."

Lawrence, J. "You do not know what the decision was. It must have been in Lord *Kenyon's* time when he knew of *Orrell* v. *Maddox*. There although *Onslow* the *plaintiff* had received rent, yet his tenant was not in possession."

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The Solicitor General observed upon this case as follows; "*Onslow*'s ancestor, upon the statement, leased for 1000 years; *Waterton* paid rent till 1783; *Smith* was tenant in possession, and paid to *Waterton*; then *Waterton* surrendered. As between *Waterton* and *Smith*, the statute of limitations operated, because he had got into possession wrongfully. But possibly the court might say, you going upon *Waterton*'s title by the surrender, shall not stand in a better situation than he; but to say that, if the lease had expired, *Onslow* could have been barred, would have been absurd."

Lord Ellenborough, C. J. "In that way every man might have his lands taken from him by granting a lease for twenty-one years, receiving rent all the time, and not having his attention turned to the fact of who was in the actual possession."

Cur. adv. vult.

And now the opinion of the court was delivered to the following effect, by

Lord Ellenborough, C. J. after stating the case. "In the several arguments on the case, many points were argued with much ingenuity, on several questions about which the court has not entertained any doubt. 1st, Whether the estate was copyhold or customary freehold? 2dly, Whether, if not strictly copyhold, it passed by the will by the description of 'all that copyhold land,' &c. or, whether a will making use of such a description is sufficient to direct the use of the surrender? 3dly, Whether the right of entry was tolled by a descent cast? And lastly, Whether the ejectment is barred by twenty years' possession, during all which time the *defendant* and his father received the rent? And it was said that, although there was a subsisting lease, yet, by not paying rent, the tenant permitted a forfeiture more than twenty years ago, and the lessor of the *plaintiff* was entitled to enter, and not having done

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so within twenty years, he was also barred on that ground from bringing his ejectment. These points were sufficiently answered in the argument, and it is not necessary to go into them at length. The estate is parcel of the manor held by copy of court-roll which passed by surrender, and was demised with licence from the lord, and was surrendered by *T. Taylor*, according to the custom of the manor, to such uses as she should appoint by her will in writing. So circumstanced, it appears to us, the freehold was in the lord, and not in the tenant. As to this case, therefore, it is copyhold. It is called 'all her copyhold' in the will, and it is not contended that she had any other estate to which it could apply, and supposing it to be a misdescription, there cannot be a doubt, if by such description she meant that estate, it could pass. So, as to the other objection, that the right of entry is tolled by the descent, two satisfactory answers have been given: that the objection does not apply to customary estate, where the estate is actually in the lord, nor where the party has no remedy but by entry. In like manner as to the statute of limitations, the estate being let to a tenant under a lease granted by the devisor, the devisee could not enter to support the ejectment during that lease, and if there was a forfeiture, he was not obliged to take notice of it. But the point most material is, whether the will is in writing under the terms of the surrender, and whether it does not come within the 7th section of the statute of frauds, and should not be signed according to the opinion of Lord *Kenyon*, in *Doe* d. *Tempest* v. *Dancer*, and the expressions used in *Tuffnell* v. *Page*. On this we had some strong doubts, but we are now satisfied that a will to direct the uses of a copyhold or customary estate passing by surrender is not within the statute of frauds, and need not be signed, unless it is required by the custom of the manor. We are not now to inquire whether immediately after the

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statute it would not have been best to have held that copyholds were within the statute; for the uniform current of authorities is that they are not within it, because they do not pass by the will, but by the surrender, and it is therefore not a devise within the 5th and 6th section of the act. The 7th section requires a creation of trust or confidence to be manifested by writing signed by the party, or by his last will in writing. And the 9th section requires any assignment of a trust or confidence to be in writing, signed by the party or by such last will. It was contended on the part of the *defendant*, that under these clauses a declaration or creation of a trust, and also a grant or assignment of any trust must be in writing signed by the party or by a will signed, and that a will declaring the uses of a surrender was a declaration of a trust. The gentlemen who agued this felt a difficulty as to the particular will required. If they put it as a will attested by three witnesses, they had to encounter every decision which held that in this case a will with three witnesses was not necessary: yet in no clause of the statute is there a will of land mentioned, which does not require it to be so attested. And a will of such customary lands is no grant of any trust nor assignment of any trust; for there is no separation of the legal and equitable estate. The statute itself looked to no will of lands, but such as is executed as there directed; and having done this, as to devises of lands, it proceeds to protect declarations of trust, evidently alluding to the equitable interest in lands; and the terms in the 7th and 9th section must refer to such will of lands. This will is therefore not within the statute of frauds. The next and last question then is, whether this will is within the terms of the surrender, a will in writing. Now the 32 *H. VIII.* statute of wills, gave power to dispose of lands whereof the

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party was possessed at the time, by will in writing. Under this statute short notes taken by a lawyer from the testator were held to be a good will in writing, 1 *Anderson*, 34, and other authorities for that proposition, mentioned by Lord *Coke*. Indeed every decision on the statute is an authority of what in the language of the law is a will in writing. And in *Carey* v. *Askew*, on the 9th of *May*, 1796, before Sir *Lloyd Kenyon*, master of the rolls, sitting for the Lord Chancellor, his honour determined that a mere draft of a will, the signing and publication of which were prevented by the sudden death of the testator, yet being proved in the ecclesiastical court as a testamentary paper, was sufficient to pass copyholds, which the testator had before surrendered to the use of his will; *Cox's* notes to the case of *Wagstaffe* v. *Wagstaffe*.* The original will in that case was produced to us at the argument, and it was as it was taken to be in the notes to that work. We are therefore of opinion, that this is a will in writing within the words of the surrender."

Postea to the plaintiff.

Wall *v.* Nixon.—*February* 6.

Evidence. Twenty years' possession. Churchland Grant.

In the case of an injury done to church lands, by a rivulet being penned back upon them by a headstock, the proof of the existence of the headstock for about 20 *years, though it would be evidence of a grant in other cases, is not sufficient to warrant the continuance of it. For the grant of the*

* 2 *Peere Will.* 259.

prior incumbent will not bind the successor. But it may be used as evidence to shew an ancient grant; yet even that cannot be, if the commencement of the first erection be shewn, for that rebuts the presumption of antiquity.

1806.

WALL *versus* NIXON.

UPON an action on the case for erecting a tumbrel bay, in the *whitstering* grounds of the *defendant* by which the water was driven back upon the *plaintiff*'s garden to his injury, &c. which was tried before HEATH, J. at *Maidstone*, it appeared that the *plaintiff* was the vicar of D. in *Kent*, and the injury was done to the garden of the vicarage house, and the *headstock* or tumbrel bay was made somewhat above 20 years ago, and the learned judge held that, this garden being church land, although in any other case the possession of this headstock for twenty years, would have been evidence of a grant by deed, yet had the preceding vicar made such a grant, it would not bind his successor. He therefore refused to nonsuit the *plaintiff* on this ground, and called upon the *defendant* to shew that no injury was done to the garden. A verdict was had for the *defendant*.

SHEPHERD, *Serj.* (and PITCAIRN was with him) obtained a rule *nisi* for a new trial, and on the motion,

The COURT recognised this opinion of the learned judge, but added that it might be evidence to go to a jury that there was a headstock anciently. But in this case, it was only proved that this individual headstock was erected about that time, and that no other was ever known to have been erected there.

The rule *nisi* was granted; and upon the argument the same doctrine was acceded to by the Court, and the case was afterwards argued and decided upon the balance of the evidence.

1806.

ANONYMOUS—Practice. Time to declare.—4th *Feb.*

Practice. Outlawry. Abatement.

Where one is arrested on a joint contract for a small debt, and the other debtor is not arrested, but is abroad; and proceedings to outlawry against him would exhaust the debt; the court will not compel the defendant *who is arrested to relinquish his right to plead in abatement.*

Anonymous.

GASELEY moved for time to declare, unless the *defendant* would consent not to plead in abatement. The debt was only 20l: The *defendant* was arrested on a joint contract: The other *defendant* was a common soldier abroad: if the *plaintiff* declared on a single contract against one of the *defendants*, he would be discharged out of custody, and he might plead in abatement: to proceed to outlawry would exhaust all the amount of the debt. Upon these grounds he moved.

The COURT refused the rule *nisi*, and said, that if it was done in a case of small value, it might be made a precedent for a case of larger value.*

* I have no note whether the court granted a common rule for time to declare.

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN EASTER TERM,

In the 46th Year of the Reign of Geo. III.

The KING *against* The Free-fishers and Dredgers of WHITSTABLE.—*April* 24.

Where a company was incorporated solely for adventure and profit by their mutual labour, and to receive a daily pay for such work as each member should perform for the corporation, and a bye-law was depriving one of his profit in certain cases until a fine be paid, as if he ceased to be a freeman, and where one was so deprived of profit, held that it was not an amotion from the corporation, and he was not entitled to a writ of mandamus to restore him.

Mandamus. Corporation. Bye-law. Amotion.

1806.

The KING *versus* The FREE-FISHERS, &c. of WHITSTABLE.

THIS was a rule to shew cause why a writ of *mandamus* should not issue directed to the *defendants* commanding them to restore one *W. Adley* to the office of a freeman of the said company. The prosecutor *Adley* was a freeman of this company, which was an ancient company, and was further incorporated by an act of the 33d *Geo. III.* The company were joint-lessees of a certain oyster-ground and were governed by certain bye-laws; under which each member is bound to dredge a certain number of days such a quantity of oysters as the foreman directs, and he pays them a certain sum for their day's work, the surplus going to pay the in-

1806.

The KING *versus* The FREE-FISHERS, &c. of WHITSTABLE.

terest of the debt due by the company. A bye-law was made the 22d of *July*, whereby any one who should be engaged in any other oyster-ground should pay 10l. for every offence, and should be excluded from all share of profits until the same should be paid, and the same should be divided as if such freeman had wholly ceased to be a freeman of the company. The prosecutor performed a certain day's work and demanded 6s., for his share, of the foreman, who refused to pay him until he had paid the 10l. according to the bye-law, which penalty had been previously demanded; but he had no notice of any meeting nor any summons to attend, nor any notice of complaint. The prosecutor was by such proceedings deprived of his share of the profits. The *defendants* by the affidavit of their foreman stated the bye-law, and the breach thereof by the prosecutor, and that he was duly summoned to attend an adjourned court, and that he refused and still refuses to pay the 10l. fine; but it did not state the express adjudication of any fine.

Sir VICARY GIBBS, BAYLEY, Serjt. and ABBOTT, shewed cause, and contended that the real object of this *mandamus* was to compel the *defendants* to pay 6s. The company agree to divide their profits according to certain proportions, and afterwards they make a bye-law to impose a fine upon any persons who commit certain acts, namely, who engage themselves in any other similar concern of dredging oysters. Upon this bye-law the prosecutor is convicted, and is deprived of certain profits until it is paid, but he is not removed from the corporation, yet this *mandamus* treats him as if he were removed, and directs the company to restore him.

1806.

The KING *versus* The FREEMEN, &c. of WHITSTABLE.

SHEPHERD, Serj. and DAMPIER, observing that the mode of proceeding of the corporation was very artfully contrived to prevent the prosecutor from obtaining redress, argued that he was deprived of all the benefits which he might have derived from being a member, as much as if he were actually amoved. The only privilege of the corporation is the participation of the profits, and depriving him of the profits and refusing to pay a day's share is a deprivation of all privileges as effectually as a regular amotion. They are partners, and no action will lie for the day's pay; the bye-law says, that the profits shall be divided *as if the party ceased to be a freeman.* This therefore is a complete suspension of privilege amounting to an absolute amotion.

The COURT thought that, although it should be admitted that the prosecutor could have no other remedy, yet the writ could not issue to restore the prosecutor, considering that he was not in fact amoved, and he was not ousted of his privileges as a corporator, for he might still attend at all courts and meetings, and exercise any other rights of the office.

RULE DISCHARGED.

SPENCELY (qui tam) *against* DR WILLOTT.

April 25*th*.

Where in a qui tam *action for usury, the principal witness, the borrower, had distributed a printed memoir containing a statement of the case which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them; held that the discovery of this circumstance after the trial was not a sufficient cause for a new trial.*

New Trial. Witness. Jury.

1806.

SPENCELY qui tam *versus* DE WILLOTT.

ERSKINE, in last term, obtained a rule to shew cause, why there should not be a new trial in this case, upon affidavits, stating that the witness *Chambonas*, whose cause this in effect was, it being an action for penalties, for usury in a loan of money to him. *Chambonas*, had distributed about to the neighbouring coffee-houses near *Westminster Hall*, where the witnesses were, a certain paper entitled a Memorial, purporting to be a statement of his case, one of which was proved to have come to the possession of one *Cassano*, who officiated as interpreter. *Chambonas*, being a *Frenchman*, was incapable of giving his evidence in *English*, and it was plainly observable that *Cassano* often used expressions of his own, rather than a close translation of the evidence; for which he was rebuked by the court. It appeared that a large impression had been worked off for *Chambonas*, but it did not appear how many were actually distributed, nor that the jury had seen any of them. The attorney for the *defendant* did not discover this fact till after the trial; and the damages recovered were to the amount of 25,000*l.*

GIBBS now shewed cause, and insisted that this paper not being proved to have come to the hands of the jury, and possibly being, for aught that appeared, the trick of the *defendant* himself, did not amount to such an undue influence upon the jury as to entitle the *defendant* to a new trial.

GARROW and DILLON endeavoured to assimilate this case to that of the *King* v. *Jolliffe** who had circulated a hand-bill in the assize town previous to the trial of an information against him, in consequence of which the judge, at *nisi prius*, put off the trial, and this

* 4 *T. Rep.* 285.

court granted a criminal information against him. And they contended that, although it might be not such a paper as might do harm, and although it might not be supposed to have an influence upon the jury, yet it would be a proper rule to prevent any possible misconduct, in endeavouring to influence the jurors, by shewing that even a foolish vain attempt, would frustrate the very end which was sought to be gained by it. And they said it was not denied that the *plaintiff* and *Chambonas* knew of it.

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SPENCELY qui tam versus DR. WALLOTT.

Lord ELLENBOROUGH, C. J. "In order to make this a foundation for a new trial, it should be shewn, that the paper had some effect actual or probable on the verdict; but it is not brought within the sphere of the jury, and it does not appear, that any were given away where they were, and it would be dangerous to say, that a trial should be questioned, because a paper had got into the hands of a witness, especially were the damages are heavy. It would go to shake all the verdicts that may be obtained. Admitting all that can be proved, and supposing him to have given to the interpreter a full statement of the evidence before the trial, that would not be a sufficient ground for a new trial. It is not stated that he mistranslated any thing; he rambled and conducted himself strangely, he ran before the question now and then, and gave great trouble, but I cannot say that he incorporated this into the evidence from intrinsic knowledge, and not as evidence. *Chambonas* was attending as a witness, and this was what he could swear; suppose a witness on the other side was attending, and this is a communication to him of what is to be sworn, I cannot say that it ought to vitiate the trial. For suppose the party tell him to take care what he swears, for that, meaning the contents of the paper, will be sworn by another person; I cannot say, that it should affect the verdict. I cannot say that every writing of any kind, and however circulated should affect the trial, unless the verdict was likely to

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SPENCELY qui tam *versus* DE WILLOTT.

be influenced by it. In the case of *Joliffe*, there was a publication in the place of trial, and the object of the publication was to influence the jury, and there was no other object apparent upon the face of it."

GROSE, J. "Had it not been for so large a sum we should have hardly heard the motion. It would be a precedent of a very dangerous sort, to permit a new trial to be granted for this. There is nothing imputed to the *plaintiff* that he was party to it, and this paper only contained in reality that which was sworn, and it could have no operation upon the evidence to mislead the jury."

LAWRENCE, J. "A new trial ought not to be granted in this case. There is no reason to suppose that it had any influence on the witness or the jury. Where a witness has had that testimony pointed out to him which he should give, and which he would not otherwise give, or where the paper influenced the jury, that would be a ground for a new trial, but that is not so here, and we must be very careful in overturning verdicts for extrinsic matter set up after the trial."

LE BLANC, J. "This differs materially from the case of the *King* v. *Joliffe*, for there the publication might probably influence the jury, and it was very right that the case should not be tried by the same jury."

RULE DISCHARGED.

1806.

SPENCELY qui tam *against* SCHULLEMBERG.—
25th April.

Where an attorney in a cause had been served with a notice to produce an agreement entered into by his client, held that he was bound to give evidence of the conteres of such notice; for the privilege as to evidence is confined to the oral or written communications of the client himself, and does not extend to all papers and communications which the attorney receives in the course of the cause.

Attorney. Privilege. Witness.

SPENCELY *versus* SCHULLEMBERG.

IN this case, which was a similar action for penalties, the *plaintiff* had delivered a notice in writing to the attorney for the *defendant* to produce the original agreement in writing, and upon being called upon to produce it, the *defendant's* attorney said, he had delivered it to Mr. *Garrow*, one of the counsel for the *defendant*. The counsel for the *plaintiff* would then have examined the attorney as to the contents of the notice, they not being able to prove it by any other means. To this the counsel for the *defendant* objected, urging that it was the privilege of the client that his attorney should not be allowed to disclose those things the knowledge of which he acquired in the course of the cause; and his testimony was rejected by Lord ELLENBOROUGH, C. J. who tried the cause. Whereupon for want of proving the contents of the notice to produce the agreement, without which the agreement which the *plaintiff* called for could not be identified, the *plaintiff* was nonsuited.

Sir VICARY GIBBS, for the *plaintiff*, in last *Hilary Term*, obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had; and now

GARROW and READER shewed cause. "If the law requires a party to serve a paper on the other party, he ought to prove the service regularly, and not to

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SPENCELY versus SCHULLEMBERG.

take the chance of the diligence of the attorney on the other side, and presume upon his being able to extract the evidence required out of him. The attorney therefore ought not to be called upon to produce the notice, neither ought his memory to be taxed with the contents of the notice; for that falls within the principle that you shall not extract any thing from him, which was communicated confidentially by his client, and that rule should extend to every thing which is communicated to him for his client's benefit, in the course of the cause."

LE BLANC, J. "Suppose he were the servant, and not the attorney of the plaintiff."

GARROW. "It is said that even in that case he ought not to communicate it; but *à fortiori*, he should not, if he be attorney. If the notice were first served upon *Schullemburgh*, the *defendant*, instead of *Moore* the attorney, and *Schullemburgh* had communicated the contents to *Moore*, then it would be clear that *Moore* ought not to disclose the contents of that communication; and the attorney for the *plaintiff* was not bound to serve the notice upon *Moore*, but ought the rather to have served it on the *defendant* personally, as he did also in this case, he ought not to be put in a better situation by doing that which was an unnecessary, if not a nugatory act."

Lord ELLENBOROUGH, C. J. "Is it not a privilege restricted to that which the client communicates himself? I thought indeed, at the trial, that as it was a communication which he received as attorney, in his confidential character, he was entitled to refuse the answer."

GARROW. "I admit that the attorney may be permitted to prove that he received the notice. But the contents must be considered as a communication

in the cause, whether by the party or from any other person, and I do not understand the rule to be confined solely to the oral or written communications of the client himself."

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READER on the same side, contended that as the *plaintiff* had not shewn that the original notice was lost, he could not be let in to prove the contents of it, in this way by parol evidence, and that such a notice must be proved like all other documents, by producing the original or proving the loss of it, in order to let in parol evidence.

Lord ELLENBOROUGH, C. J. "The question is, whether the *plaintiff* ought to be let into secondary evidence of the contents of a paper, served in the course of the cause, that paper being mislaid? Unless the witness of whom the question as to the contents was demanded stood in a different situation from other witnesses, they have a right to ask him the question as to the contents of it. Then is he privileged from his situation as attorney in the cause? Had it happened that the notice had been delivered to him, in the presence of his client, and instead of reading it himself, the client had read it to him, it might have given rise to an argument that it was only an oral communication to him by his client; but here he read it himself, and the rule is confined to all things which the client communicates to his attorney. I thought that it extended to all things of which he comes to the knowledge in virtue of his character as attorney, but now I think it must be understood with the limitation, that it must be what he derives from the oral or written communication of his client."

RULE ABSOLUTE for a new trial.

ORR *against* MAGINNIS.—26*th* April.

Where a captain of a vessel abroad drew upon his owners for provisions supplied for the use of the ship, and before the bill became due or was presented for acceptance settled with them, and at the time of presentation for acceptance, there was nothing due to him; held, that this was not sufficient to dispense with the necessity of notice to him, the drawer, of the non-acceptance.

1806.

ORR versus MAGINNIS.

IN *assumpsit* by the payee of a foreign bill of exchange against the drawer, the *defendant*, who was captain of a vessel belonging to Messrs. *Lennox* and Co. at *Liverpool*, being then at *Demerara*, drew a bill upon Messrs. *Mullion*, *Lennox*, and Co. at *Liverpool*, in favour of the *plaintiff*, a merchant at *Demerara*, dated 25th *January*, 1802. Before the bill was presented, the drawer came to *England*, and arrived in *May* in the same year, and left *England* again in *June* following, and was absent at the time of the presenting for acceptance and for payment. The bill was drawn for supplies furnished for the ship; and while in *England* he came to an account with Messrs. *Lennox*, in which he charged for these supplies, and was paid for them. On the 22d of *October*, 1802, when the bill became due, it was presented for payment and protested, but although acceptance was refused, and it was noted for non-acceptance, there was no notice, nor protest to the drawer for non-acceptance, and it was contended that there was no necessity for either, as there were no effects in the hands of the drawees at the time of the presenting it for acceptance, although at the time of the drawing of the bill there was a balance of 116*l.* payable to *Maginnis*, the drawer, by *Lennox* and Co. at *Liverpool*. The holder being at *Liverpool* returned it to the payee at *Demerara*. At

the trial before Lord ELLENBOROUGH, C. J. at *Guildhall*, the *plaintiff* was nonsuited, on the ground that *Maginnis* never had notice of the non-acceptance.

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TADDY now moved for a new trial, and endeavoured to bring this case within the principle of the case of *Rogers* v. *Stephens*,* and *Bickerdike* v. *Bollman* † It was not contended, he said, that the *plaintiff* should have given notice, but the holder at *Liverpool*.

Lord ELLENBOROUGH, C. J. "The cases have never been carried further than to dispense with notice, where there were no effects in the hands of the drawer at the time of the making of the bill, nor afterwards during the time for which the bill is drawn. That was the effect of the decision in *Bickerdike* v. *Bollman*, which was not very much approved of at the time, and I, for one, will not extend it; and it is expressly laid down, that you are not bound to present a bill for acceptance before it is due, but, if you do present it, you must communicate to the party the knowledge which you have, and give notice of the dishonour by non-acceptance."

RULE nisi refused.‡

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* 2 *T. Rep.* 714. † 1 *T. Rep.* 405.

‡ "It is not necessary to say whether the rule which dispenses with notice, in cases where the drawer has no effects in the hands of the drawee, was wisely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer; and the courts have said, that, where the drawer has been guilty of fraud, he shall not claim the protection of those rules, which were introduced for the benefit of drawers acting *bonâ fide*. When a person draws a bill upon another, who has no effects in his hands, he is

TURNER *against* RICHARDSON and ROTHERHAM, assignees of BARBER.—*24th April.*

Bankrupt. Covenant. Assignee. Lease.

Where the assignees of a bankrupt, who was possessed of a term, merely put the same up to auction, to ascertain whether it was of value, without giving themselves out to be the proprietors, and, there being no bidders, interfered no further in the matter, and never received rents; held, that they were not answerable in covenant to the lessor.

"not entitled to notice of its being dishonoured, since he "must know without such notice, that funds have not been "provided to answer it." *Per Chambre, J.* in *Clegg* v. *Cotton*, 3 *Bos.* and *Pul.* 239.

In *Walwyn* v. *St. Quintins*, 1 *Bos.* and *Pul.* 652. *Eyre, Ch. J.* said, "it might be a proper caution to bill-holders not "to rely on it as a general rule, that if the drawer had not "any effects in the hands of the acceptor, notice was not "necessary. The cases of acceptance on the faith of consign-"ments from the drawer not come to hand, and the cases of "acceptances on the ground of fair mercantile agreements, "might be stated as exceptions, and there might possibly be "many others. See also *Clegg* v. *Cotton*, 3 *Bos.* and *Pul.* "239, where *A.* the agent in *America* of *B.* in *England*, drew "a bill upon *B.* and indorsed it to *C.* also residing in *America*, "who indorsed it over. Before the bill became due, *A.* hav-"ing reason to believe that *B.* would fail, lodged property "belonging to *B.* in the hands of *C.* to answer the bill in "case it should be returned, *C.* undertaking to restore the "same, whenever it should appear that he was exonerated "from the bill. Acceptance and payment of the bill were "refused, but no notice was given to *A.*; held that *A.* was dis-"charged. *Heath, J.* observing, that no doubt the rule "dispensing with notice, proceeded on the ground of a sup-"posed fraud. But that ground was not applicable to a "case where an agent drew upon his principal, unless under "very particular circumstances."

1806.

TURNER certus RICHARDSON and ROTHERHAM.

IN *covenant* for non-payment of rent, and for not repairing, the *plaintiff* declared against the *defendants* as assignees of one *Barber*, on a lease, granted the 1st *January*, 1789, by Sir J. C. *Turner* containing covenants to repair, and to pay rent, &c. with an averment that on the 28th *January*, 1802, Sir J. C. *Turner* assigned his interest to the *plaintiff*, and that, after *Barber* had entered and was possessed, to wit, on the 1st *January*, 1796, all *Barber*'s, the lessee's, interest came to the *defendants* by assignment, who entered and were possessed of the premises for the residue of the term, &c.; and assigned a breach in the non-payment of rent, for three years from *August* 1st, 1804, &c. and a further breach that the premises were out of repair.

The *defendants* pleaded, first, that the premises did not come to them by assignment, in manner and form, &c.; 2dly, that they did not enter into the said demised premises, in manner and form, &c. 3dly, that they were not possessed of the premises, for the residue of the term, in manner and form, &c. and 4thly, that *Barber* being a trader, &c. became bankrupt; that he was indebted in 100l. to a creditor, that a commission issued and he was declared a bankrupt, that his personal effects (in general terms,) were assigned to the *defendants* in trust for the equal benefit of the creditors of the said *Barber*, but that the right, title, interest, and term of the said *John Barber* of and in the said demised premises, with the appurtenances, was not nor is particularly mentioned or specified in the said indenture of assignment, from the major part of the commissioners, that the *defendants* are no otherwise assignees, and that they have not at any time hitherto taken possession of the said demised premises, with the appurtenances, &c.; 5thly, after stating the bankruptcy as before, that the *defendants* have not at any

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time hitherto entered into the said demised premises, with the appurtenances, &c.: 6thly, after stating the bankruptcy as before, that the *defendants* have not at any time hitherto consented to accept the estate, right, title, interest, and term of the said *John Barber*, of and in the premises as part of the estate and effects of the said *John Barber* the said bankrupt; 7thly, after stating the bankruptcy and assignment, and negativing any other assignment as before, that they the said *defendants* after the making the said indenture, to wit, on the day of in the year of our lord to wit, at *Newcastle* upon *Tyne* aforesaid, renounced the estate, right, title, interest, and term of the said *John Barber*, of and in the said premises with the appurtenances, from being and being to be considered as part of the estate and effects of the said *John Barber*, the bankrupt, as aforesaid. To which the *plaintiff* replied, tendering issues upon all these several pleas, and upon the last, that before the *defendants* renounced as aforesaid, they accepted and were possessed of the said demised premises, with the appurtenances, for the residue of the term. In all of which, issues were joined, the *defendants* alleging, in their rejoinder to the last replication that before they renounced, &c. they did not accept, &c.

The cause was tried before CHAMBRE, J. at the last *summer* assizes for *Newcastle*, when the only proof that was given of the *defendants* having consented to the assignment of this term was in their having advertised the premises for sale in the following terms: "To be sold by public auction at the house of *Hugh Brodie Bigg market Newcastle* upon *Tyne* on *Monday* the 19th *December*, 1796, between the hours of three and five in the afternoon subject to such conditions as shall then be produced. All those, &c. held by lease for 34½ years from *Lammas* 1789, under Sir J. C. *Turner*, knight, situate in or near the *Castle Garth*, let to different tenants

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for upwards of 200l. per annum. The respective tenants, upon application will shew the premises, and further particulars may be known by applying at the office of Messrs. *Fenwick*, in *Gate-street*, *Newcastle*." The *defendants* had never received any rents and the *plaintiff* demanding, for the 3 years arrears of rent, at 132l. 6s. per annum, 396l. 18s. and also 160l. for repairs, making a total of 556l. 18s., the *defendants* under the advice of their attorney, Mr. *Fenwick*, issued this advertisement and put the premises up to sale, but there were at that time no bidders. One part of the premises comprised a meeting-house for some dissenters, and the rest were small tenements which were very much out of repair. Afterwards a person offered 100l. for the lease of the meeting-house, but, as that would not pay the *plaintiff*, the *defendants* refused to accept it, and interfered no further, but they did not give notice of their abandonment to the *plaintiff*, and upon this evidence the learned judge thinking that it did not amount to an acceptance of the interest of the bankrupt *Barber*, by his assignees, the *plaintiff* was nonsuited.

COCKELL, Serj. in *Michaelmas* term last obtained a rule to shew cause why there should not be a new trial, and relied upon the case of *Broome* v. *Robinson* at N. P. before Lord *Kenyon** and the case of *Bourdillon* v. *Dalton*.†

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* Wednesday, 3d *December*, 1800, at *nisi prius*, before Lord *Kenyon*, C. *J.*

Broome v. *Robinson*. This was an action for use and occupation from *Lady day* to *Michaelmas*, 1800. The *defendant* was the assignee of a bankrupt, who was the *plaintiff*'s lessee of the premises. The *plaintiff* applied to the *defendant* upon the bankruptcy, to know if he meant to take the bankrupt's interest in the lease. The *defendant* answered that, if he did

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PARK and HOLROYD shewed cause. "In the case cited, as tried before Lord *Kenyon*, there was no question but that the party had taken possession for a time; but here no possession was taken, the assignees only put the estate up to auction, merely to ascertain whether it was of any value or not; one of them being the only meeting-house of the kind at *Newcastle*. Nobody would bid for the estate, and, before they abandoned it to the lessor they were bound to ascertain the value, because they would be liable to the creditors, if they abandon what is valuable, and do not do every thing which is necessary to shew that it is so or not."

Lord ELLENBOROUGH, C. J. "How do you reconcile it, with respect to the crown, your holding yourselves out to be proprietors in this sale by auction, when you are not so?"

PARKE. "The crown has not been defrauded by it."

Lord ELLENBOROUGH, C. J. "Yet you meant to do so; you cannot buy in without giving yourselves out

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not let it by *Lady day*, he would give it up. The bankruptcy was in the *January* preceding, and at *Lady day*, the *defendant* paid the rent and offered the *plaintiff* the key.

Gibbs, for the *defendant*, contended, that the *defendant* as assignee was not liable;

But Lord *Kenyon*, *C. J.* held, that although he might have refused to accept the lease, at first, yet he could not take it in part and afterwards refuse it, because he found it would not answer and he could not let it.

Verdict for the plaintiff.

† *Peake's Ni. Pri. Ca.* 238. and 1 *Espin.* 233, and cited *Salk.* 297, and 1 *Lev.* 127, as to executor's waving a term.

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to be the owners of the estate. And would it not be evidence to go to a jury, if you had, previous to the sale, given in your name as owner to the auctioneer."

PARK. "There was no evidence of that being done and the court will not assume that it was." He then cited *Eaton* v. *Jaques*.*

Lord ELLENBOROUGH, C. J. addressing himself to *Cockell*, Serj.; "What have you to answer to the words 'entered and were possessed?'"

COCKELL and RICHARDSON, in support of the rule. "The nature of the premises was known to the assignees; they entered or did that which is tantamount to taking possession. There was no communication to Mr. *Turner* the landlord, but their own attorney, by public advertisement, states that they are assignees of the premises, that they have a term in them, and they are put up to be sold by public auction: which is equivalent to what was done in the case of *Broome* v. *Robertson*, in which Lord *Kenyon* says, that, although it might have been rejected at first, yet the assignee could not take it in part and reject it in part."

Lord ELLENBOROUGH, C. J. "They state nothing in the advertisement, from which you can infer that they had made any entry or had taken possession in any manner. In the case of *Broome* v. *Robinson*, there could be no other decision."

LAWRENCE, J. "They only assume, that they have the power of selling the tenements, if they can find a purchaser."

RICHARDSON. "In all other cases the assignment is sufficient to make the assignee liable, and here, at

* 2 *Dougl.* 438, 455.

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least, they have given their assent to the assignment; for what act of assent can be greater than the exercising the property over them, by exposing them to public sale ?. An unsuccessful attempt to sell a term, too, is a prejudice to the interest of the reversioner, and no person who is to be considered as a mere stranger can have a right to try experiments of that sort."

Lord ELLENBOROUGH, C. J. "This is an action by the landlord against the assignees of a bankrupt, charging them with a breach of covenant, to which as assignees they would be liable, in the non-payment of rent, and the non-repair of the premises. In this action, it is necessary to allege, that the assignees were in possession in the usual manner, and on all of these allegations distinct issues are taken. First, that there is no assignment; 2dly, that they did not enter into the premises, and 3dly, that they were not possessed of the premises, for the residue of the term. As to the entry into and the possession of the premises, there is no evidence in proof that there was any actual entry, and the question is whether these premises under the circumstances can be considered as having come to the *defendant* by assignment. It has been long ago settled that assignees need not take what is called *damnosa hæreditas*, and may have their election to take it or not; but after they have taken they cannot reject it. So in the case of *Broome* v. *Robinson*, it was merely decided that after a man had most artfully taken possession for a time to see if he could let the premises to advantage, he should not be permitted to give them up; for there, it wanted the consent of the other party, for him to be allowed to make that experimet; but, if there had been an agreement between the landlord and him, I should have thought that he would not have been liable. Here, the assignees being anxious to know whether the premises were

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worth the while of the assignees to take them, they made an experiment to ascertain their value. In this case they are intitled to do so; for every thing that they can find to be of value they are bound to take for the benefit of the bankrupt's creditors. They publish an advertisement to dispose of the term by public auction, and do not even denominate themselves as the proprietors. They mention nobody as being proprietors but say they will sell the term, or that the term is to be sold. And so it would have been to be sold, if there had been any bidder. Their only object was to produce a bidding, and if the bidder had come afterwards to call upon them to make good the sale, they would, at that instant, have taken the term upon themselves to sell. They left it in suspense, till the moment when a purchaser came forward, whether they would sell; but, no purchaser coming forward, there was no actual sale. In fact this is no more than an experiment to try the value, which, in some shape or other, they are bound in duty to the creditors to make."

GROSE, J. of the same opinion. "The question is, as his lordship has stated it, whether the premises came to the hands of the *defendants* by assignment; Whether they are possessed as assignees, and that is the issue. What is the evidence? The *defendants* are in a difficult and delicate situation, for if it turned out to be of no value, and they entered, they would be liable to be sued as assignees. They, therefore, cause the things to be advertised for sales, without stating that they have any interest in them, for the purpose of ascertaining the value. As far as concerned them and the world, they were of no value at all, and therefore they did not enter into possession. The most that can be made of it would be to leave it to the jury, whether in fact they were in possession, but that would only have been in case they

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entered or did some decisive act of ownership; but they never actually entered into possession and I do not know how to say, that here is evidence of their being in possession taking that in the sense of the issue."

LAWRENCE, J. of the same opinion. "There must be some assent on the part of the assignees in order for the issue to be found in favour of the *plaintiff*. And it is said that this advertisement is strong evidence of that assent, because they hold out to the world, that they are the owners of the estate. But the words of the advertisement do not bring us to that conclusion; they hold out only, that they can become the sellers; but it does not thereby necessarily follow that they had then done that which is necessary to enable them to convey a title. It was necessary for that purpose that they should enter, but it does not follow that they had done so. *Fenwick* said he advised them to do this that they might not be charged with any thing, in case the premises should not turn out to be of any value."

Le BLANC, J. "The *defendants* stood in a difficult situation. The property was on lease to undertenants and they entered upon no part of the premises, nor did they, nor the superior landlord receive the rents. When the law says, that the assignees shall take upon themselves, in trust for the creditors, all the property of the bankrupt which is beneficial, the same law must vest them with every authority to find out whether it is beneficial or not; and, where the assignees have done nothing more than is necessary for that purpose, it cannot put them in the situation of assignees with the burthen of an unbeneficial term. In this case they appear to have done that which is the best for the creditors, and the best method of ascertaining whether it will be a beneficial term or not. If we go the length of saying, that, by merely ordering the premises to be put

up to sale in this manner, they have taken upon themselves the assignment, because they have exercised an act of ownership upon them; we must go further and say that the employing a surveyor to look over the premises will be an assent to the assignment, because that would be as much an act of ownership as this is."

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RULE DISCHARGED.*

HILARY TERM.†

PERES *against* SEVERN.—*Feb. 7th.*

"*Justly indebted for goods sold and delivered,*" *not stating by whom, to whom, or for whose use, is insufficient for an affidavit to hold to bail.*

Practice. Affidavit to hold to bail.

ESPINASSE obtained a rule to shew cause, why the *defendant* should not be discharged out of custody upon filing common bail, for a defect in the affidavit to hold to bail, which stated that "the *defendant* was indebted to the *plaintiff* in 54*l.* for goods sold and delivered; and as the acceptor of a bill of exchange:" without saying by whom delivered, to whom, or for whose use.

PERES *versus* SEVERN.

ESPINASSE cited *Mackenzie* v. *Mackenzie*.‡

WIGLEY, shewed cause.

The COURT held this bad as being too general.

RULE ABSOLUTE.

* With respect to the argument used concerning the duty upon the sale, and the mode of avoiding it, it was observed that in case of a bankrupt's property there was no duty to government.

† N.B. The two following cases were omitted last term by an accidental mistake at the press.

‡ 1 *Term Reports*, 717.

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The KING *against* the SHERIFF of MIDDLESEX, *in re* FLACK *against* BERCROFT.—*Feb. 7th.*

Practice. Bail. Stay of proceedings. Attachment. Sheriff.

Bail to the sheriff may set aside an attachment upon payment of costs, and putting in bail without swearing to merits, or that there is no collusion, if it be sworn that it is made on the part of the bail to the sheriff.

FLACK *versus* BERCROFT.

COMYN shewed cause against a rule obtained by SMITH to shew cause, why the proceedings upon the attachment against the *sheriff* should not be set aside, upon payment of costs the bail having justified.

He stated, that there was a defect in the affidavit, it being made by the clerk to the attorney for the *defendant*, who swore only, that the application was made on the part of the bail to the *sheriff*; without either swearing to merits or, that there was no collusion. And he contended, that the application could only be made either by the *sheriff* or by the *defendant* himself. In the one case, it must be sworn that there is no collusion between the sheriff and the *defendant*: in the other, that he has merits. And he cited the *King* v. *the Sheriff of Surrey*.*

SMITH, in support of the rule. "The application on the part of the bail to the *sheriff* is the same as if on the part of the *sheriff*, for it is only for their benefit that it can ever become necessary for him to stay the proceedings on the attachment. And, in the case of an application to stay proceedings on the bail-bond, which is a case perfectly similar in principle and in the object to which it is directed, namely, the relief of the bail to the *sheriff*, it is not necessary for the bail to swear to merits.

* 7 *T. Rep.* 239.

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The COURT held that the bail to the *sheriff* might make the application; that the application on the part of the bail was the same as that on the part of the *sheriff*; and that as it was sworn that it was made on behalf of the bail, who were entitled to be let in to make a defence, if there should be found to be any, it was not necessary for them to swear to merits. But there having been a trial lost, the rule was made

ABSOLUTE, the attachment standing as a security.

EASTER TERM.

The KING *against* the BISHOP of OXFORD.

April 24th.

Curacy. Mandamus. *Debito modo electus.*

A mandamus to a bishop to grant a license to a curate, upon the nomination of the inhabitants of a parish, must state that there is an immemorial usage for the inhabitants to elect, or an immemorial endowment; for a nomination, by the inhabitants merely, is not sufficient title to call upon the bishop to licence.

The KING *versus* The BISHOP of OXFORD.

UPON a rule to shew cause why a writ of mandamus should not be quashed, the writ was as follows:

Oxfordshire. George the Third, &c. To the Right Reverend Father in God, *John*, Lord Bishop of *Oxford*, greeting,

Whereas the Rev. *Isaac Knipe*, Clerk, hath been duly nominated and appointed by the inhabitants of the township, village, or hamlet of *Piddington* in the parish of *Ambrosden*, in our county of *Oxford*, or the major part of them, to be chaplain or curate of the church or chapel of *Piddington* aforesaid. And whereas, he, the said *Isaac Knipe*, by virtue of such his nomination and appointment, ought by you to be licensed to officiate as chaplain or curate of the said church or chapel of *Piddington* aforesaid, and to have, use, and enjoy, all the privileges, profits, and advanta-

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ges, of and belonging to the said place and office of chaplain or curate, of the said church or chapel. And, whereas he, the said *Isaac Knipe*, after such his nomination and appointment, did, in due manner, request you the said bishop to grant your licence to him the said *Isaac Knipe* to officiate as chaplain or curate of the church or chapel of *Piddington* aforesaid. Yet you the said bishop, well knowing the premises, but not regarding your duty in this behalf, have absolutely neglected and refused, and still do absolutely neglect and refuse, without any reasonable cause whatsoever, to grant a licence unto the said *Isaac Knipe*, to officiate as chaplain or curate of the church or chapel of *Piddington* aforesaid; In contempt of us, and to the great damage and grievance of the said *Isaac Knipe*, as also of the inhabitants of the township, village, or hamlet of *Piddington* aforesaid, as we have been informed from their complaint made to us in this behalf; (as it is reasonable), We command you firmly enjoining you that, immediately after the receipt of this our writ, you do without delay grant a licence to the said *Isaac Knipe* to officiate as chaplain or curate of the church or chapel of *Piddington* aforesaid, and to have, use, and enjoy all the privileges, profits, and advantages belonging to the same, or shew us cause to the contrary thereof, lest by your default the same complaint be repeated to us, and in what manner you shall have executed this our writ make appear unto us, at *Westminster* on *Tuesday* next, after fifteen days from the day of *St. Martin* then returning unto us this our writ. And this you are not to omit on peril that may fall thereon. Witness, *Edward*, Lord ELLENBOROUGH, at *Westminster*, the 8th day of *November*, in the 46th year of our reign.

And upon this writ it was objected that it was defective, in not stating a good title to the relief prayed, and

that it should have been stated in the writ, either 'that the rector assented to the curate having the use of the pulpit, or that there was an immemorial custom for the inhabitants to elect a curate to officiate, or an immemorial endowment.'

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MILLS and MANLEY shewed cause. "There is no case to shew that a writ of mandamus which is sufficient to call for a return can be quashed. In 6 *Mod.* 310. Lord *Holt* says, 'the party ought to suggest whatever is necessary to entitle him to be admitted and, if that is not done, or being done, the facts are false, in either of these cases it is sufficient matter for a return.' Here the *mandamus* could not be sued out without stating that which is necessary upon affidavit to entitle the party to it. In *Tremaine's Pleas of the Crown*,* there is a precedent of a mandamus to the Dean of *Exeter*, to admit one of the eight men of *Ashburton* to a particular office, but there is nothing stated in the mandamus as to the right. So in the *King* v. *the Dean and Chapter of Dublin*,† it is said 'as to the expression of the mandamus, this party has no reason to shew the statutes, as the other must do that in his answer and return.' And here as to the want of title, in this case, there is as much stated as in the case of election to a corporation, where it is stated only that the party, *debito modo, electus fuit*. In *Rex* v. *Ward*,‡ it was not averred in the writ, that 'Dr. *Ward* was a person bound to admit and swear in, and *Strange* answered that if he was not he should return that.' There would be no benefit derived from quashing this writ, because, if there are two or three modes by which we might have a right, we must not state it under each form, but confine ourselves to one."

* 467. † 1 *Strange*, 536. ‡ 2 *Strange*, 893.

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The King versus The Bishop of Oxford.

LAWRENCE, J. "By the common law, the nomination of the curate is in the parson of the parish. If it is not so here, must it not be stated in the writ as a custom; or, else, how can it be denied or how introduced into the proceedings."

MILLS, "There is no case wherein it is necessary to put the title upon the record."

Lord ELLENBOROUGH, C. J. "*Debito modo electus* imports, not only the due election, but also the power of the persons who elected; but, in this case, though 'he was duly nominated and appointed by the inhabitants,' it does not appear that they had a right to nominate."

MILLS. "In all the cases they have shewn these things as cause against the mandamus, and I find no case in which the mandamus has gone, that it has been quashed for this cause."

MANLEY, *on the same side.* "A mandamus is merely in the nature of an action upon the case, and, in all cases of action on the case, the declaration is very general; as in an action for not grinding of corn at a mill, the party only states, that he is possessed of the mill, and all the rest is merely evidence. I do not find one case in which a mandamus has been quashed, for not stating more than *debito modo nominatus* or *debito modo electus*, and they have no precedents in the crown office or in *Tremayne*, of a mandamus to the bishop to licence."

SIR VICARY GIBBS, *contrà.* "There is one in *Tremayne*, to institute churchwardens, elected differently from the common law mode of election, and there the custom is stated."

LAWRENCE, J. "Writs are not uncommon for persons to be instituted into offices. In *Tremayne* 550, there is a mandamus to institute into the office of may or

of the vill aforesaid, into which place he ought to be admitted, and there is a custom stated."

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MANLEY, then admitted that in the case of the eight men of *Devon* there is a return; and, in the same book, there is another *mandamus*, in which the custom is very fully set out; in the case of *Yolland* in *Tremayne's Pleas of the Crown*, 468.

Lord ELLENBOROUGH, C. J. "If they had traversed in this case, they could not have been the better for it, for he might be appointed, yet the bishop might not be bound to licence."

Sir VICARY GIBBS. "In *Yolland*'s case they return *non debito modo electus*, and then there is a *mandamus* stating that, whereas the parish is an ancient parish, and there is and ought to be, &c. and so stating the custom. In 2 *Shower's Reports*, 217, the court say to the counsel, 'state your right, or otherwise the writ shall do you no pleasure.' If my answer is to arise out of those facts which are stated, then the writ is sufficient. As in the case of a mayor, who states that A. B. was duly elected; his title is complete, if the fact be true that he was duly elected, although in proof of that title it might be necessary to shew many other facts, which might make out that more complex fact, *debito modo electus*. Here may be a right to appoint a curate, but that is not a right to have a license, unless he obtain the consent of the rector to let him officiate; *Rex* v. *Bishop of London*.* We do not set up a collateral fact as an answer to the right which they have shewn, but merely allege, that they have not stated a sufficient *prima facie* right. If a man is duly elected a freeman, the common law gives him a right to the institution; but here, as in the case of a

* 1 *Term Rep.* 330.

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churchwarden, the right to elect does not reside wholly with the parishioners, but there must be a custom contrary to the common law. In *Needham's* case in *Tremayne* 469, a custom is stated for the two churchwardens to be elected by the parish. Where a mandamus states that, which if it be true, is not a sufficient title, that is defective and ought to be quashed. The rector is here patron of the vicarage, a religious house are the rector and patron of the vicarage, and it was a mere slip, that cause was not shewn against the rule for the mandamus."

ABBOTT, on the same side. "Supposing this were a declaration we should be here upon a demurrer, and if the title be only defectively stated, the action may be sustained; but if a defective title be stated, the party cannot recover. Now the cases are all clear, that an appointment by the inhabitants is not sufficient; but there must be either the consent of the rector or an immemorial endowment giving a right of freehold. The cases are those of Lecturers, but they are the same in principle, and an immemorial endowment is taken as evidence of the assent of the vicar and rector, and the ordinary, *Rex* v. *the Bishop of London.*" And he referred to the precedents in *Tremayne*, 505, *et al.* for a *mandamus* to grant probate, and the case of *the King* v. *the Justices of the West Riding of Yorkshire.**

Lord ELLENBOROUGH, C. J. "This is a writ by which a party is required, to do that which he has hitherto forborne to do in breach of some duty. The facts to be stated in the writ are, therefore, those which constitute the duty. It ought to state such facts as *prima facie* throw the obligation upon him to do what is required of him. This writ states only that 'whereas he was duly appointed by the inhabitants to be curate,

* 7 *Term Rep.*

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and by virtue thereof was entitled,' &c.; but it states no custom which entitles him by virtue of such mere nomination, to be licensed, nor no endowment, but lays it as a mere inference from such a nomination, that he ought to be licensed by the bishop. Is that stating a good *prima facie* case? In the *King* v. *the Bishop of London*,* it is laid down that the rector has the full title to the pulpit, and no person can be entitled to use it, unless there is some custom, or some competent agreement which entitles him to it. The inhabitants may certainly, subject to the right of the rector to licence him to officiate afterwards, appoint him to act as curate. But, in order to lay a *prima facie* title, they ought to shew a custom which may render that agreement unnecessary, or that there is an endowment. As to the cases of *debito modo electus*, it follows of course, that if a man is *debito modo electus*, he is entitled to be sworn in. Nor is there any analogy to a declaration founded upon possession; for that is a sufficient title to that which has generally gone with the *plaintiff*'s house or mill. This writ does not state a sufficient *prima facie* title to call upon the bishop for a return, and therefore it must be quashed."

RULE ABSOLUTE.

ROBERTSON *against* LIDDELL.—*April* 24th.

Bankrupt. Stat. 1 Jac. I. c. 15. Departing from dwelling house.

Quere. *Whether if a trader depart from his dwelling-house with a clear intent to delay creditors, it be not an act of bankruptcy, although no creditor be delayed. See statute* 1 Jac. I. c. 15.

* *Ut supra.*

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ROBERTSON *versus* LINDELL.

IN this case, which was tried before *Chambre*, J. at the last assizes for *Durham*, the question turned solely upon the bankruptcy of one *Walmsley*, under a joint commission against *Milborne*, *Hollow*, and *Walmsley*. It was proved that they were all in bad circumstances and all left their dwelling-house to go over the river from *Durham* into the county of *Northumberland*, to avoid being arrested, that, at the house to which they went, they sent for their attorney, and stated to him their situation. The attorney remonstrated with them and said, that it was a clear act of bankruptcy, and advised them to return home immediately and call their creditors together. They returned accordingly in the evening of the same day, and it did not appear that a creditor was actually delayed. The learned Judge, upon the whole of the evidence, said he had considerable doubt whether *Walmsley* even meant to depart with intent to delay creditors, and he left it to the jury, that, although they should find he had that intent, yet, upon the construction of the statutes of bankruptcy, they ought to find also that some creditor was actually delayed. The jury found a verdict for the *defendant*, and consequently that *Walmsley* was not a bankrupt.

COCKELL, in *Michaelmas term* last, obtained a rule to shew cause why the verdict should not be set aside and a new trial had, as for a misdirection of the learned Judge, and contended that there was clear evidence of departing the house with intent to avoid arrest and therefore to delay creditors; and that, when that departure with such intent was clearly proved, it was unnecessary to shew the actual delay of creditors, for the statutes were in the alternative "with intent or whereby a creditor may be delayed."*

TOPPING and HULLOCK, now shewed cause. "There

* 13 *Eliz.* c. 7. 1. *Jac. I.* c. 15.

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ROBERTSON *qui tam* v. LIDDELL.

being a joint commission against the three partners, the question is now whether *Walmsley* left the house with intent to delay creditors? and next, whether any one creditor was actually delayed? From the report of the learned Judge, it is clear that he left it to the jury upon the two grounds to say whether he departed the house with intent to delay creditors, and further whether a creditor was actually delayed; with a particular direction that they were not bankrupts, if the insolvent persons had not actually delayed some creditor, although they might have gone away with the intent to delay them. The learned Judge was very correct in leaving that question to the jury, and they have accordingly found, in effect that there was no actual delay of creditors. In order to make a man a bankrupt under the statute 1 *Jac.* c. 15, the party must depart 'with intent or whereby a creditor may be delayed.' In *Fowler* v. *Padgett*,* the party left his dwelling-house, in order to secure certain property for his family, and it was held that *or* should be construed *and*: and, that it was necessary that he should leave his house with intent to delay, *and* that a creditor should be actually delayed. So in *Barnard* v. *Vaughan*,† it was held that actual delay was not sufficient, unless there was an intent to delay. Here it was to avoid the arrest that the bankrupts went over to *South Shields*; they went on the contrary side of the river; they went into another county for fear of being arrested, and all three went for that purpose."

LAWRENCE, J. "In the case of *Barnard* v. *Vaughan*, Mrs. *Barnard* left one house and it did not appear but that she went to the other house."‡

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* 7 *T. Rep.* 509. † 8 *Term Rep.* 149. ‡ In the report of the case it appears that she first quitted one house and never went back to it.

1806.

Bankruptcy
against
Lancaster.

DAMPIER, *amicus curiæ* now observed that the question was there whether the leaving of the second house was an act of bankruptcy, and that the case was decided entirely upon the ground that the *fieri facias* was an execution *in rem*.

LAWRENCE, J. "In *Fowler* v. *Padget*, I thought it was determined only that unless there was an intent to delay creditors as well as an actual delay of creditors there was no act of bankruptcy. If a man merely denied himself at his hour of dinner or merely from any bodily infirmity, it should not make him a bankrupt; otherwise it would render every trader's situation too precarious. An intent is clearly necessary."

LE BLANC, J. "From the case in the *Common Pleas*, *Judine* v. *Dacosser*,* it does not appear whether the creditor was actually delayed."

[Upon this it was mentioned from the bar that BAYLEY, Serj. citing that case in the court of *Exchequer*, upon the argument in the case of the extent on the bankruptcy of *Castell* and *Co.* bankers, said that there was no creditor delayed. And *Cockell*, Serj. thereupon added, that, from his recollection of the evidence, it was so, for the bankrupt went to *Walworth* from his counting-house, and the servant proved, that, during that time, no creditor called.]

HULLOCK, on the same side, cited *Wilson* v. *Norman*,† where the act of bankruptcy relied upon was the absenting himself from his house to avoid being arrested, and a witness proved that he came to his house to conceal himself, and it being object-

* 4 *Bos.* and *Pull.* 234. † *Montague* on the Bankrupt Laws, Appendix 162. 1 *Espin.* 334.

ed that it ought to be shewn that some writs were out against him it was overruled by Lord *Kenyon*. He cited also *Miller* v. *Turner*,* *Jackman* v. *Nightingale*,† Though a man orders himself to be denied, yet if he be not denied he is not a bankrupt. So in *Garret* v. *Moule*,‡ keeping house with intent to delay a creditor is not sufficient to constitute an act of bankruptcy unless there be also a defraud or hindrance of the creditor. So in *Foe* v. *Saunders*,§ and *Ex parte Cookshott*,‖ if a man should make a fraudulent conveyance whereby it was intended to defraud or delay his creditors, and it was clear from the subject-matter of the conveyance that it could not defeat or delay the creditors it would not be an act of bankruptcy." From all which cases he concluded that upon the other clauses of the same statute the construction had been that a mere intention of delay was not sufficient, but that an actual delay was necessary to make a man a bankrupt.

1806.

Rotherwood versus Lindsell.

Cockell, Serj. and Wood, *contrà*, in support of the rule. "From the report it is clear that the learned Judge left it to the jury that it was necessary in order to find *Walmsley* a bankrupt that there should not only be an intent to delay, but that some creditor should be delayed. Now the latter part of that proposition is from the words of the statute a question of some doubt, and Lord *Kenyon* has spoken of the case of *Fowler* v. *Padgett*,¶ in terms of disapprobation. Leaving a house with a view to defraud or delay creditors is an act of bankruptcy within the words of the statute. Departing from his dwelling-house becomes an act of bankruptcy, or not according to the *intent* of the

* *Montague*, 167. † *Bull. N. P.* 40. ‡ 5 *T. Rep.* 575. § *Cooke's B. L.* 4 *Edit.* 74. ‖ 3 *Bro. C. C.* 502. ¶ *Cook B. L.* 82. last edit. cites *Hall's* case, *Stra.* 809.

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party. His very absenting himself will be a sufficient *prima facie* evidence of his intent to delay. The statute 13 *Eliz.* c. 7, has only the words 'to defraud or hinder creditors;' and the statute 1 *Jac. I.* c. 15, is in order to give further benefits to creditors, as against the effects of bankrupts, and it contains the words, 'to the intent or whereby they may be defeated or delayed,' and it is a very strange construction, to say that it shall narrow the cases of bankruptcy, when the recital is to give a further remedy. In that case *or* must not only be construed *and*; but *may* must also be construed *shall*. To keep house alone is difficult to be proved against a man, because it cannot well be shewn that he did keep house, without a denial of him being actually made."

LAWRENCE, J. "No, he might give orders not to admit any one, and to deny him."

LE BLANC, J. "There is no case, I believe, between the statutes of *Eliz.* and that of *James.*"

Lord ELLENBOROUGH, C. J. "There is some doubt about the facts. There should be a new trial, for the purpose of a special verdict. The verdict as it stands is improper as to one point, to raise this question; for the intent is clear; and probably there will be further evidence of the delay of some creditor."

GROSE, J. "I dare say there will be further evidence. Hundreds of commissions have been supported upon mere evidence of going away."

LAWRENCE, J. "In the case of *Fowler* v. *Padgett*, it was understood that a mere intent of delay would be sufficient; upon the case of *Woodyear*, Lord KENYON and ASHURST, J. said *or* must be read *and*. GROSE, J. did not go upon that ground; and I thought that the whole sentence must be reconciled. *Bar-*

nard v. *Vaughan* went upon the ground that the other cases had decided it."

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ROBERTSON *versus* LIDDELL.

LE BLANC, J. "It struck the court that it would be very hard, if a party went out on a fair purpose that he should be a bankrupt, because some creditor were actually delayed."

RULE ABSOLUTE for a new trial.

The KING *against* the INHABITANTS of BINEGAR.—7th May, 1806.

Paupers. Settlement by marriage. Order of justices. Estoppel.

By order of two justices, not appealed from, J. S. and Betty *his wife were removed to M. N. as their last place of settlement, and, afterwards, the said* Betty *as the wife of J. S. was removed from the parish of W. to the said parish of M. N., without appeal.* Betty *went and served in the parish of B. and resided forty days there, under a hiring for a year, and returned to M. N. and there became chargeable. J. S. was, at the quarter sessions, convicted of vagrancy, for deserting his said wife; but, upon appeal against an order of justices removing the said* Betty *from M. N. to the parish of B., the appellants produced evidence to shew the marriage a nullity, which was not denied; held, that, after the orders unappealed from, and the conviction, the respondents were estopped from producing such evidence.*

Order of removal "upon complaint that the paupers lately came and intruded into the said parish of K., endeavouring there to settle as inhabitants thereof, contrary to law, not having any way acquired or obtained a legal settlement therein, and are likely to become chargeable thereto, and we do upon due examination, adjudge the said complaint and premises to be true, and we do further, upon the examination of the said Betty *the wife of J. S. upon her oath, adjudge that they were last legally settled at &c.," held to contain a sufficient averment of their being then actually intruding, and of their then present settlement, and also to be upon sufficient examination, although only upon that of the wife; for a wife may know her husband's last place of settlement of her own knowledge.*

1800.

The KING versus the Inhabitants of BINEGAR.

UPON hearing the appeal of the churchwardens and overseers of the poor of the parish of *Binegar*, in the county of *Somerset*, to the court of quarter session for that county, against an order of Sir *J. C. Hippesley*, Bart. and *William Bingham*, two of his majesty's justices of the peace of and for the said county of *Somerset*, for the removal of *Elizabeth Walters* single woman from the parish of *Midsomer Norton* in the said county of *Somerset* to the said parish of *Binegar*; That court confirmed the said order of removal subject to the opinion of this court on the following case: On the 25th *April*, 1793, by an order under the hands and seals of two justices of the peace of the said county made on the complaint of the churchwardens and overseers of the poor of the parish of *Kilmersdon*, it was complained and adjudged in the following words, viz. that "*John Savage* labourer, and *Betty* his wife (the said *Betty* being the pauper above removed,) lately came and intruded themselves into the said parish of *Kilmersdon*, endeavouring there to settle as inhabitants thereof contrary to law, not having any way acquired or obtained a legal settlement therein, and are likely to become chargeable thereto: We do upon due examination adjudge the said complaint and premises to be true, and we do further, *upon the examination of the said Betty*, the wife of the said *John Savage*, taken upon her oath, adjudge that the said *John Savage* and *Betty* his wife were last legally settled in the said parish of *Midsomer Norton*." And the said *Betty* was removed from the said parish of *Kilmersdon* to the said parish of *Midsomer Norton*; but against this order of removal there was no appeal. On the 29th *July*, 1799, by another order under the hands and seals of two justices of the said county, made on the complaint of the churchwardens and overseers of the poor of the parish of *Willow* in the said

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The KING *versus* the Inhabitants of BINEGAR.

county, it was complained and adjudged in the following words, viz. " that *Elizabeth Savage*, (being the said pauper) lately came to inhabit in the said parish of *Willow*, contrary to law, not having any ways gained a legal settlement there, nor produced any certificate, owning herself to be settled elsewhere, and that the said *Elizabeth Savage* is actually become chargeable to the said parish of *Willow*, we the said justices upon due examination of the said complaint and premises, and also upon the examination of the said *Elizabeth Savage* upon oath, before us, and upon due consideration by us had in the premises, do adjudge the same complaint and premises to be true; and we do likewise adjudge that the last lawful settlement of her the said *Elizabeth Savage* is in the said parish of *Midsomer Norton;* and she was therefore removed from the said parish of *Willow* to the said parish of *Midsomer Norton:* and against this order likewise there was no appeal. At Lady-day, 1803, the said *Elizabeth* hired herself for a year at the wages of four guineas, as a dairy maid, to *James Brookes* of *Binegar*, and served with him, in that parish, for sixteen months. The said *John Savage* is still living. After the said *Elizabeth* left the service of the said *James Brookes*, she returned to the said parish of *Midsomer Norton*, and became chargeable to that parish. In *May* last, the said *John Savage* was committed to the house of correction, for having run away and left the said *Elizabeth* therein called his wife so chargeable, until the next quarter sessions held for the said county in *July* last, when the charge in the said commitment being duly proved to the said court of sessions, upon oath, in the presence of the said *John Savage* to be true, the said court adjudged the said *John Savage* to be a rogue and vagabond, and a male upwards of twelve years of age; and ordered him to be detained in the said house of correction for the space of three days, and that before he

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The KING *versus* the Inhabitants of BINGHAM.

was discharged from thence he should be sent to be employed in his majesty's service by land in his majesty's *fortieth* regiment of foot; but the said *John Savage* hath never contributed to the maintenance of the said *Elizabeth*. The respondents produced evidence to the court, that a marriage solemnized between the said *John Savage* and the said *Elizabeth*, before the said orders of removal or either of them were made, was a nullity, and the nullity of such marriage was not disputed. The question for the opinion of the court of *Kings Bench* is, whether or not the respondents were estopped either by the former orders of removal, or by the adjudication of the said *John Savage* to be a vagrant, for running away and leaving the said *Betty* who is in such adjudication considered as his wife, from giving any evidence whatever to prove the said marriage a nullity.

GARROW and TOPPING, in support of the order of sessions; "The question is whether the sessions have done right in the last order made. The order of removal of *Elizabeth Savage*, though not appealed from is immaterial as to us and cannot affect the present appellants; for it does not involve the question of the marriage. The order of commitment of *John Savage* for having run away from his wife and children, the parish have nothing to do with, and are not affected by it. That order applies to the man only personally, upon the statutes concerning vagrants, and the question upon it only turns upon his *vagrancy*. Then, the first order is bad upon the face of it, and the circumstance of there being no appeal will not conclude the parish. It professes to adjudge on the settlement of *Savage*, upon the examination of *Betty Savage* herself only; and is, therefore, informal. They use the words 'on due examination we do adjudge the complaint and premises to be true,' and 'we do further, upon the

examination of the said *Betty Savage*, adjudge that the said *John* and *Betty* were last legally settled at *Midsomer Norton*;' but they do not state, on due examination, they find that they were settled there. And the wife can know nothing of the husband's settlement except from information."

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Lord ELLENBOROUGH, C. J. "Why not? They might live fellow servants in the same family."

GARROW. "There is then another objection that on the face of this order it is not an adjudication of their present settlement; for they only state that they were last legally settled at *Midsomer Norton*."

Lord ELLENBOROUGH, C. J. "We cannot intend an intermediate settlement."

TOPPING, on the same side. "If the order is bad on the face of it, the defect in the order cannot be helped by the circumstance of omitting to appeal against it; The *King* v. *Inhabitants* of *Chilverscoton*.* Now they have not stated enough to give jurisdiction; for it should state, that the parties are in the place from which the order of removal is to remove them; and this is not, therefore, an order which the sessions could amend; for it is clear, that the sessions cannot amend where it is necessary to have evidence in order to find the amendment. It omits also to state, that they have intruded and were then in the parish of *Kilmersdon*, endeavouring to settle themselves."

Lord ELLENBOROUGH, C. J. "Do the words not import that they are then there? The words are also "and they are likely to become chargeable. If the sessions have adjudged on the fact of the marriage,

* 8 *Term Rep.* 178.

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The KING versus the Inhabitants of BILSDON.

it is conclusive upon us, and the fact of the marriage was clearly adjudged upon."

ORDER of SESSIONS and order of removal QUASHED.

PARKER *against* GORDON.—*May* 15*th*.

A bill accepted, payable at a bankers, must be presented for payment before six o'clock, or rather within the usual hours of a banker's shop being open, and proof of presentment afterwards, by a notary, when a boy came to the door, and could give no answer as to the payment, the clerks being gone, was held not to be proof of the dishonour of a bill.

Semble pari ratione, *all bills should be presented during the regular business hours of the acceptor, which are variable; and presentment after will not entitle the notary to protest them.* Certes, *It is by no means safe to rely on the notary, for proving the presentment of a bill, unless he goes with it at the first presentation, in the middle of the day.*

PARKER versus GORDON.

IN an action by indorsee of a bill of exchange, against the drawer, the question turned upon the presentment of the bill and the notice thereof to the *defendant*. The bill was accepted specially, "payable at *Davidson's* and *Co.* 84, *Pall Mall.*" To prove the tender for payment, the *plaintiff* called the notary, who went to Messrs. *Davidson's*, after or about six o'clock, when the shop was shut and a boy came to the door and could give no answer as to the bill, the clerks being gone. No previous tender for acceptance was proved. The notice was by a letter put into the post-office in *Inner Temple Lane*, on the next day, directed to the *defendant*.

Lord ELLENBOROUGH, C. J. before whom the

cause was tried, at the sittings in term, nonsuited the *plaintiff*.

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MARRYAT now moved for a rule to shew cause why there should not be a new trial, on the ground of a misdirection, by the learned judge. And as to one point, he cited *Sanderson* v. *Judge*,* to shew that notice, sent by the post, of the dishonour of the bill, was sufficient, the only proof of notice being the putting of a letter in the post. As to the tender at the banking house after the shop was shut, he said the bill was directed payable at *Davidson's*, 34, *Pall Mall*; the notary called there and was answered by a boy, that the shop was shut and the clerks were not there; and, although it could not be contended that at 12 o'clock at night, a tender would be sufficient, yet it was a question for a jury to say what is the proper time of presentation.

Lord ELLENBOROUGH, C. J. "I rather differ from you in that; for I think it is for the judge."

LAWRENCE, J. "When the bill is accepted in these terms payable at a bankers, he, the indorsee or drawer, takes it liable to this inconvenience."

MARRYAT. "He cannot know from the bill itself whether it is payable at a bankers or not; for *Davidson* and *Co.* are not described as bankers. In *Leffley* v. *Mills*,† and this is not the case of an acceptance by a banker, but a bill payable at a banker's, the court said, they could not take notice of what are called banking hours, but must consider what is the ordinary time of presenting bills. In that case, it is held, that the party has the whole of the day to pay the bill, and if so, why should the holder be bound to present it long before the time at which the acceptor is bound to pay it? In this case there was, in fact, an earlier presentment by the banker's clerk, and this was only the

* 2 *H. Bl.* 509. † 4 *Term Rep.* 170.

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second presentment by the notary. If this strictness is required, then the bill must always be presented by the notary in the first instance; which would be very inconvenient."

Lord ELLENBOROUGH, C. J. "The question is, whether this bill has been dishonoured. The person on whom it is drawn accepts it payable at a bankers, by which the holder is not precluded from presenting it to the person himself. If he gets payment at the bankers, he is satisfied; if not, he may resort to the party himself. But by the terms of the acceptance he is to go, at the convenient time of resort, to the place where he is directed, and it is to be presumed the holder will inform himself of the proper time; but to go at an improper time is luring the drawer, as it were, into the dishonour of the bill. If it is not paid at the usual hours, then he is to go to the party himself: but it is not in evidence here that he has gone to that party or that he presented the bill earlier. The holder has only to understand the plain import of the bill."

LAWRENCE, J. "Nobody could keep money at a banker's to make his bills payable there, if it were otherwise than as his lordship has decided. You say, that the acceptor is not bound to pay earlier at a banker's shop, than any where else, and that, therefore, presentment, during the time when it might be paid, or during the time the party has to pay it in, is sufficient; but, if so, the business of a banker could not be done, unless he kept the shop open all night. I consider this as payable at a bankers and known to be so. The holder ought to go at the usual time."

LE BLANC, J. "The inconvenience to the mercantile world would be on the other side entirely."

RULE for a new trial REFUSED, for want of a due presentation of the bill.

1806.

HANHORN *against* THOMAS.—8th *May*.

Where upon application to the attorney for the defendant *to admit certain facts in proof, and he refused; and afterwards, upon going to trial, it appeared, that, by having pleaded a tender, it became unnecessary to prove them, but the* plaintiff *took witnesses to the assizes for that purpose, and was allowed their expences, to a large amount, in the taxed costs, notwithstanding they were not called upon the trial, the court refused to revise the taxation.*

Costs. Admission. Witness.

HANHORN *versus* THOMAS.

TAUNTON obtained a rule to shew cause why the *master* should not revise his taxation of costs in this cause, in order, that several sums, amounting to 64*l.* in the whole, being the expence of certain witnesses who attended at the assizes for the *plaintiff*, should be struck out.

The case was, that, in an action of assumpsit, upon a contract relating to the purchase of several estates, including a great many distinct averments, which upon the declaration were necessary to be proved, the *defendant* pleaded a tender, and when the cause came to be tried, at the last assizes for *Hereford*, before Lord ELLENBOROUGH, C. J. the counsel for the *defendant* endeavoured to put the *plaintiff* to the proof of these averments; but his lordship thought, that, by the plea of tender, the declaration was admitted, and it was not necessary to prove any of them, but only to prove the amount of the damages, and the only witness called was a Mr. *Stephenson*. The master finished the taxation of costs in *March* last, and included in the amount the expences of six witnesses and upwards, who attended to prove the special averments. On shewing cause, it appeared that the *plaintiff*'s attorney having taken the advice of a gentleman at the bar, who thought he could not safely advise the going to trial, without

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proof of these averments, he applied to the *defendant*'s attorney to admit some facts, in order to save expense, which he refused to do.

TAUNTON contended, in support of the rule, that it being necessary to state, that the witnesses were material and necessary in the affidavit to increase costs, that could not truly be stated, and the *plaintiff* could not be entitled to their expences, and whether they were necessary or not was the only question to be considered by the court. As to the conduct of either of the attorneys, who were under a mistake as to the necessity of the witnesses, it could not affect the case; and if they were not necessary, the conduct of the *defendant*'s attorney could not help the *plaintiff*'s case; for it was not the business of the former to admit proof of that which might be unnecessary, nor to supply defects in the *plaintiff*'s case, and it was the business of the *plaintiff*'s attorney to know the degree of proof, and the number of witnesses necessary at the trial.

Lord ELLENBOROUGH, C. J. "Are you to expect, that we will open the taxation for a party who conducts himself in this way; who refuses to admit, and then complains that witnesses are produced for the purpose of proving that, which it was in his power to admit? At a period of time when it is doubtful between the parties, whether proof is necessary or not, the party applies *quia timet*, the other refuses, and thus makes it necessary in the opinion of the other party to take the witnesses to the assizes. As to the question whether the witnesses are material and necessary that has been before the officer of the court; he has allowed them, and under these circumstances, we do not see any reason to revise the act of our officer, in such a case."

RULE DISCHARGED.

DESHONS *against* HEAD.—*May* 14*th*.

Practice. Plea. Abatement. Variance between original and declaration.

Where the defendant, *being sued by original, had pleaded the statute of additions in abatement of the original writ, and had given a rule to reply, without oyer of the original writ, the court, upon motion, discharged the rule to reply, in order to let in the* plaintiff *to sign judgment, as for want of a plea; notwithstanding the rule that oyer cannot now be prayed of an original writ.*

Semble. *No advantage can now be taken of a variance between the writ and the declaration.*

DESHONS *versus* HEAD.

THIS was a rule to shew cause why a rule to reply in the cause should not be discharged, and the *plaintiff* be at liberty to sign judgment.

Upon the affidavit of the *plaintiff*'s attorney, it appeared, that he had sued out a special capias against the *defendant* on a bill of exchange, delivered declaration and demanded a plea; when he found a plea in abatement filed in the office and was served with a copy of a rule to reply. The plea in abatement was, that the original writ contained no addition to the *defendant*'s name.

LAMBE shewed cause. "The present rule is a new experiment, and it is clear that the plea in abatement was not for mere delay, for otherwise the *defendant* would not give a rule to reply. If the plea was a mere nullity then the *plaintiff* ought to have signed judgment. The plea is verified by affidavit, and if the *plaintiff* made a blunder by omitting to sign judgment, when he might have signed it, the *defendant* may well take advantage of it; and if the plea was bad, the *plaintiff* ought to have demurred. The object of the *defendant* was to save himself the costs; for the *plaintiff* had sued out two originals upon the same bill of

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exchange, and had obtained, from the drawee, the debt and costs in the action against him. The *defendant* could not have oyer of the writ because of the rule of the court."

COMYN, *in support of the rule.* "This plea is not merely defectively pleaded, but is such a plea as cannot be received, and yet we cannot sign judgment because there has been a rule to reply, and it would be a contempt of the court if judgment were signed without previously discharging that rule. This plea ought not to be received because the *defendant* has not prayed oyer of the original writ, and in *Com. Dig. Pleader, R.* 2, it is said 'the *defendant* shall not plead in abatement of the writ before oyer of it; and the same rule is laid down in *Abatement* H, 'no plea to the writ can be before oyer.' This is not a new experiment, for in *Hall* v. *Finch*,* the court said 'at this day the courts of justice interpose in a summary way, and in many cases set aside proceedings upon motion, where there is no other remedy; as where they see that a plea is frivolous they will set it aside.' In *Murray* v. *Hubbard*,† the *defendant* was arrested by the name of *F. Hubbard* and put in bail by the name of *S. Hubbard*, the *plaintiff* declared against *S. Hubbard* arrested by the name of *F. Hubbard*: the *defendant* pleaded in abatement of the writ, that his name was *S. Hubbard*, the *plaintiff* signed judgment treating this plea as a nullity; the *defendant* moved to have the judgment set aside; the ground of signing the judgment was that the *defendant* had not craved oyer of the writ; the court said, that, the plea being bad and wholly unavailable, they thought the judgment was right. So in *Gray* v. *Signet*;‡ there was a plea like this of the statute of additions, and a motion to set aside the plea and for leave to sign judgment,

* 2 *Wilson*, 393. † 1 *Bos.* and *Pull.* 645. ‡ 3 *Bos.* and *Pull.* 395.

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on the same ground, that the *defendant* had not craved oyer of the writ. It was said on behalf of the *defendant* that the court would not interpose to give the *plaintiff* the opportunity of signing judgment, but would put the *plaintiff* to his demurrer, because that mode would deprive the *plaintiff* of his writ of error; but Lord *Alvanley* said 'the question is only whether the plea could be received; that question appears to be decided by the case of *Murray* v. *Hubbard*; it had been long the practice not to grant oyer of original writs, and it was a strange position, that, because of that, the *defendant* should be at liberty to plead in abatement without; for the Master of the Rolls, if such a plea were pleaded, would issue a new writ agreeable to the declaration.' So in 1 *Saunders*, 318, note 3, by Serj. *Williams*, it is said from thence (from the rule that oyer shall not be given of the original writ,) it seems to follow that no advantage can be taken of a variance between the original writ and the declaration.' The cases in which that rule was laid down, were *Vauderplank* v. *Banks*,* and *Joseph Hole* v. *John Finch*,† and it is there 'said that where the *defendant* pleads a variance between the writ and the declaration, he must demand oyer of the writ to shew the variance of the writ. Although these cases were in the Common Pleas, yet there is no difference between the practice of the courts, this being upon an original. And the original writ, in fact, is never issued unless there is an outlawry or a writ of error. So there was a plea in abatement, in the case of *Wallis* v. *the D. of Cumberland*,‡ in an action upon an annuity bond; the *defendant* prayed oyer of the deed, and did not set forth the real deed, and the court held that the *plaintiff* might sign judgment or demur: and in *Ferguson*

* 2 *Wilson*, 85. † *Ibid.* 395. ‡ 4 *Term Rep.* 370.

1806.

DISHONS versus HAAG.

v. *Mackreth*,* the court, for the same cause, quashed the pleadings. This plea is verified by affidavit, but in *Gray* v. *Sidnet*, it is said there is no necessity for it; indeed, as it must appear upon oyer, it cannot be necessary, and, as there is no writ actually issues, it ought not to be made."

The COURT were strongly impressed with the effect of the cases, which took away the oyer of the writ, and said that, from the cases in the Common Pleas, it seemed, that, at this day, they ought to discountenance such pleas wholly, and to let the *plaintiff* in to sign judgment.

RULE ABSOLUTE.

The KING *against* STEVENS and Another.

Criminal Judgment. Penalty, Pecuniary fine.

Where a fixed fine, by statute, for a misdemeanor is miscalculated in the verdict and the judgment, the court, upon a rule served on all parties interested, will alter the rule for the judgment against the prisoner, and the entry roll, as to so much of the punishment, but they will not alter the judgment and verdict.

The KING *versus* STEVENS and Another.

IN this case for the particulars of which see ante Vol. 1, p. 497, the *defendants* being found guilty of a misdemeanor committed in the *East Indies*, in taking a bribe from one of the native princes, part of the penalty for which offence is the payment of the amount of the sum received, as a bribe, it appeared that, in drawing up the judgment, a mistake had been made, in calculating the value of the foreign coin, *East India* money, which constituted the bribe.

DALLAS, therefore obtained a rule calling upon the prosecutors to shew cause why the rule made on *Monday* next, after three weeks of the *Holy Trinity*, in the 44th year of his present majesty, and the entry roll in this prosecution, should not be amended by inserting after the

* 4 *Term Rep.* 370.

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The KING versus STEPHENS and Another.

words, "and also" the words, "the sum of nine thousand three hundred and eighty-five pounds part," upon notice of the rule to be given, to the attorney for the said prosecutors in the mean time. This rule was obtained upon an affidavit of Mr. *Dowse*, attorney for the *defendants*, which stated, that the fifth count in the information, charges the *defendants* with having received from a certain person, called the *Samouny Rajah*, 85,000 rupees, being of the value of 10,625l. of lawful money of *Great Britain*, as a gift and present, against the form of the statute, &c.; whereby they forfeited to our lord the king the said sum of 10,625l. being the value of the said rupees. That there was no evidence of the value of the rupees on the trial; that finding there had been a miscalculation of the value, the rupees being estimated at too high a value, he applied to the solicitor for the *East India Company*, who wrote to him, that he had seen the attorney-general, who informed him, that if there was any mistake, it should be rectified; and that having advised with counsel before the *defendants*, were brought up for judgment, as to an application to the court to rectify such mistake, it was omitted to be made in consideration of such communication. That, on the morning when judgment was pronounced by the court, it was agreed between all parties, that the rupees should be considered of the value of 2s. 2½d. each, and at the time of pronouncing judgment, the attorney-general, from a paper in his hand, stated the said agreement of the parties, and that the value was 9,385l. with a small fraction, and expressed his consent that the judgment should record the forfeiture at the sum so stated by him. Which was now made absolute by consent of all parties, and the rule and entry roll was accordingly altered as follows:

Monday next, after three weeks of Easter, 44 *Geo. III. Rex* v. *Stevens* and another. The *defendants*

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The King versus Stephens and Another.

being brought here into court, &c. and being by a jury of the country, convicted of certain extortions and misdemeanors charged upon them by the fifth, sixty-ninth, seventieth, and seventy-first counts of the information in this prosecution: Upon mature deliberation had here in court, it is considered and adjudged that the *defendant, James Stevens* for his offences aforesaid, do pay a fine to our sovereign lord the king of 5,000*l.* of lawful money of *Great Britain.* And that he the said *James Stevens* be imprisoned in the custody of the said marshal for the term of two years now next ensuing. And that the *defendant John Agnew,* for his offence aforesaid, be imprisoned in the custody of the said marshal, for the term of two years now next ensuing. And, that the said *defendants,* for the extortions and misdemeanors charged upon them by the said 5th count, do forfeit to our said lord the king, the sum of 10,625*l.* of lawful money of *Great Britain,* being the full value of the gift and present received by them as in the said fifth count mentioned. And they the said *defendants* are now recommitted to the custody of the said marshal, to be by him kept in safe custody in execution of the said judgment and until they shall have paid the said forfeiture. And the said *James Stevens,* until he shall have also paid the said fine. And it is ordered that the whole of the said fine, and also [the sum of 9,385*l.* part] of the said forfeiture, be paid to the United Company of Merchants trading to the *East Indies,* being the prosecutors in this prosecution.

BUT BY THE COURT, the judgment itself cannot be altered.

KNIGHT *against* PALMER. 1806.

Attachment will not lie against a witness served with a subpœna duces tecum, *if he do not produce a warrant described therein, because he says that he has not got in his custody; although in truth it appear that he had it. This is properly matter for an indictment for perjury.*

Subpœna duces tecum. Attachment.

ESPINASSE moved for an attachment against a witness for not obeying a *subpœna duces tecum*, and stated the following ground:

KNIGHT *versus* PALMER.

The *defendant* was sheriff of *Essex*; the action was for an excessive levy under a *fi. fa*; and to prove the levy, the *plaintiff* called one *Thorn* as a witness, who was the officer to whom the warrant was delivered; when called upon to produce it, he said, that he had it not; he had delivered it to one *Reynolds* to make a copy who had not returned it. *Reynolds* now said in an affidavit that he had delivered it to *Thorn*'s wife. *Thorn* said he had it not; and the present affidavit, as *Espinasse* stated it, went to shew that he had it.

By the COURT. "If so he is guilty of perjury, but an attachment cannot be granted if he had not brought it."

RULE REFUSED.

REX *against* FENWICK.
Exparte GILL.

Upon a habeas corpus *on which the gaoler returns a commitment, the court will only try the validity of the commitment upon the face of it. And where a return was that an apprentice was committed for absenting himself from his master's service, under stat.* 20 *Geo. II. c.* 19, *s.* 4, *which appeared good, the court re-*

Apprentice. *Habeas Corpus.* Commitment.

1807.

manded the apprentice, although it was sworn that he was bound when a minor, and that when of full age he avoided his indentures. A habeas corpus cannot be to discharge an apprentice when of age from indentures; exparte *M Davis*, 5 *Term Rep.* 715. contra. Semble, *it should be to bring up the apprentice from some custody or improper controul over his person; as, perhaps, that of the master, if he detain him by force in his service.*

The KING *versus* FENWICK.

ESPINASSE obtained a *habeas corpus* directed to the *defendant* to bring up one *Gill*, an apprentice, to be discharged out of custody, and to be discharged from his indentures. He produced an affidavit stating in effect, that he was bound to one *Garnsey*, while under age for seven years; that in *April* 1806, he became of age and previously informed his master that when he was of age he should quit his service; that when he became of age he gave notice to his master, but said that he would serve on a week with him or a fortnight, until he could get some journeyman in his place, unless he would give him wages; that his master then made no objection, and he left him on the day he told him that he should quit his service, whereupon the master complained to a magistrate, who committed him to prison under the statute, 20 *Geo. II.* c. 19, s. 4. Notice of the rule was served on the magistrate; and now the *defendant* the gaoler (or *governor*) *of Tothill Fields* Bridewell, made a return containing the commitment as follows:

Whereas complaint hath been made before us *Aaron Graham* and *Edward Naish*, esqrs. two of his majesty's justices of the peace, for the said city and liberty, upon oath of *John Garnsey*, that *Samuel Gill*, apprentice to the said *John Garnsey*, upon whose binding out no larger sum than five pounds was given, hath committed divers misdemeanours against the said *John Garnsey* his master, and in particular in having for several days absented himself from the service and employment of the said *John Garnsey* his

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master, without leave or consent contrary to the covenant of his indenture, and the statute in such case made and provided, and whereas upon examination thereof, and upon hearing the allegations of both parties, they having come before us for that purpose, and upon due consideration had thereof, it manifestly appears unto us, that the said *Samuel Gill* is guilty of the premises so charged against him as aforesaid, and we do therefore hereby command you the said constable to convey the said *Samuel Gill* to the said house of correction, and to deliver him to the said keeper thereof, together with this warrant, and we do hereby command you the said keeper of the said house of correction, to receive the said *Samuel Gill* into your cūstody, therein there to remain and be corrected and held to hard labour for the space of one month. Given under our hands and seals the 23d day of *April* in the year of our lord 1806.

The master not appearing, and no counsel appearing for the justices, ESPINASSE prayed that the apprentice *Gill* might be discharged and might also be discharged from his indentures, and cited *ex parte Mary Ann Dar..*,* where upon a *habeas corpus* to bring up the apprentice to be discharged, she being then of age, the court held, that an apprentice could not be bound to serve longer than when he becomes of age, unless he then affirms the covenant.

But by the COURT, "We cannot now take these facts into our consideration. There is no defect in the commitment, as it is returned to us, apparent upon the face of it. If upon hearing the case the magistrates did wrong in point of fact, the party must appeal or bring his action. The master is not before us, and probably this is all an after thought, and was not made an

* 5 *Term Rep.* 715.

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The KING *versus* FENWICK.

objection, by way of defence, before the magistrates. Upon a *habeas corpus* and return we can only look to the defects of the commitment apparent upon the face of it."

ESPINASSE pressed the court very much with the hardship and inconvenience of the case, and strongly relied upon the case of *ex parte Mary Ann Davis*.*

But by the COURT. "We can only look to the apparent defects of the commitment."

LAWRENCE, J. "I do not understand this case of *Mary Davis* to be law as it is reported. I do not know of a *habeas corpus* to discharge an apprentice from indentures. How can this court undertake to discharge men from their covenants upon a *habeas corpus*. There must be a mistake in it."

BURROUGH, *amicus curiæ*, said that the girl in that case was in the care of some person,† and the *habeas corpus* was to bring her up and she was discharged.

RULE DISCHARGED, and the apprentice *Gill* remanded.

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* 5 *Term Rep.* 715.

† It might be, as I should think, that the master detained her, and her friends might then apply for a *habeas corpus*, against the master to bring her up to be discharged out of his custody or personal controul, which would be, in effect, to discharge her from her indentures, and to enable her to avoid them by absenting herself from his service.—*Editor.*

The KING *against* the INHABITANTS of RICKINGHALL. —*April* 27th. 1806.

A Greenwich pensioner placed out to board by his parish, at 2s. 6d. a week paid by them to an inhabitant of another parish for his board, &c., he working as a servant for him, does not acquire a settlement by such residence and service.

Pauper. Settlement by Service.

The KING the Inhabitants of RICKINGHALL.

THIS was a case from the sessions in which the parish of *Rickinghall Inferior* had appealed to the sessions, and the parish of *Rickinghall Superior* were respondents below; upon an order of two justices for the removal of one *Henry Saunders*, his wife and child, from the parish of *Rickinghall Superior* to the parish of *Rickinghall Inferior* in the county of *Suffolk*.

The pauper *Henry Saunders*, a Greenwich pensioner, settled in the parish of *Redgrave*, came here in the year 1801, disabled by the loss of a leg. On the 5th of *March* in that year, the parish officers of *Redgrave*, agreed verbally with *Robert Crowe* of *Rickinghall Inferior*, lime burner, that *Henry Saunders* should live with him till the 8th of *November* following, and do for him whatever he set him about. The parish of *Redgrave* agreed to pay *Crowe*, two shillings and six pence per week, and *Crowe* to find board, lodging, and washing, for *Saunders* under these terms. *Saunders* lived with *Crowe* till *Christmas* following, when *Crowe* went with *Saunders* to the parish officers of *Redgrave*, and refused to keep him any longer, unless they would increase his allowance. They consented to increase it to four shillings per week, and *Crowe* thereupon agreed to take *Saunders* again till the *Easter* following; *Saunders* returned and staid accordingly; in the same manner, at *Easter*, the parish of *Redgrave* refused to continue *Saunders* upon an allowance, and hereupon *Crowe* sent him home to *Redgrave*, whence he returned to *Crowe*, and without any new express agreement continued to live with him *in the same manner as before*, until *October* the 15th, 1804, when he ceased to

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live with *Crowe* on account of his marrying. During the time that *Saunders* lived under the first agreement with the officers of *Redgrave*, he attempted to absent himself from *Crowe*, to make holiday, but *Crowe* told him he was his servant by the agreement with the parish, and that he could not go without his leave, which however he did. He went twice in the year to *London* to get his pension from *Greenwich* Hospital, and was absent two or three weeks at a time; he used to tell *Crowe* when he was going, but he did not ask leave nor did *Crowe* refuse; during the whole time *Saunders* lived with *Crowe* he was employed by him in chopping chalk, he did no work for any other person, *he slept in the parish of Rickinghall Inferior*, and received now and then six pence from *Crowe*, when he did little jobs for him on *Sundays*, and has done nothing since to gain a settlement. While *Saunders* was with *Crowe*, after the parish officers of *Redgrave* had refused to continue the allowance, he received from them, on his application for relief, at one time, half a guinea, and, at another, half a crown, and once the parish officers of *Redgrave*, took for themselves his pension from *Greenwich* Hospital. The court confirmed the order, and also granted the common costs of 40s. to the respondent considering the statute of the 8th and 9th of king *William III.* imperative on them in that respect.

W. FREER, for the respondents, was shortly heard in order to establish a hiring and contract between the pauper and *Crowe* as master and servant.

But by the COURT, it was held clearly not a contract of hiring and service, but only to board and provide for the pauper as one of the poor of the parish of *Redgrave*, and that the contract was not with the pauper but with the parish.

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FREERE then moved the question of the costs. But the court would not decide upon it.

ALDERSON, was counsel for the *defendants.*

ORDER of SESSIONS and original order QUASHED.

The KING *against* the INHABITANTS of BARMBY.—10*th May.*

Pauper Apprentice. Settlement by apprenticeship. Stat. 3 and 4 W. and M. c. 11, s. 8.

Where a pauper, apprenticed to the master of a small trading vessel had slept more than forty nights at S., but slept the last night of his service at B., and had slept there previously, more than forty nights, at his grandmother's, in consequence of being ill of a fever, and was received back by his master; held, that he was not settled in B., the residence, except for the last night, being only in consequence of sickness.

The KING *versus* the Inhabitants of BARMBY.

TWO justices by their order, removed a pauper *John Martindale, Mary* his wife, and *John* and *George* their sons, from the township of *Barmby in the Marsh,* in the east-riding of the county of *York,* to the township of *Selby* in the west-riding of the said county. The parish of *Selby* appealed to the quarter sessions, and the case was as follows:

John Martindale, the pauper, was bound apprentice by indenture dated the 1st day of *April,* 1794, for four years to *John Brealby* of *Hunslet* in the said west-riding, who was the master of a small vessel trading on the river *Ouse.* The pauper slept more than forty nights, during such apprenticeship at *Selby* aforesaid, at different times, but he slept the last night thereof, at *Barmby in the Marsh* aforesaid, at his the said *John Martindale*'s grandmother's, at which last mentioned place he had, before, slept more than forty nights in consequence of his being ill of a fever. He so went there with the consent of his said master who re-

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ceived him again as his apprentice, and he never slept at *Barmby in the Marsh* aforesaid, except as above stated. The court of quarter sessions upon the above facts reversed the said order, and at the request of the respondents stated the above case for the opinion of his majesty's court of *King's Bench* thereon.

LAMBE, in support of the order of sessions. "This is a case of a residence with a service, the master consented to the residence of the apprentice at *Barmby in the Marsh*, and took him back again. He, therefore contended, that the apprentice having resided under his apprenticeship 40 days and also the last night *at Barmby in the Marsh*, acquired a settlement in that parish, and cited *Rex* v. *Titchfield*.*

LE BLANC, J. "If this were to convey a settlement where the apprentice fell sick, a man might gain a settlement by residence in an hospital."

LAMBE, a settlement by a residence in an hospital is prevented by act of parliament,† and according to the *King* v. *Sutton*,‡ the apprentice would be settled where the master is settled."

LAWRENCE, J. "The apprentice did not reside where the master lived."

Lord ELLENBOROUGH, C. J. "All that we have of the residence of the master is, that the apprentice was bound to *John Brealby* of *Hunslet* in the said *West-riding*. At least it is pretty clear, that there is no pretence for a settlement in *Barmby*, for he falls sick there."

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* 2 *Burr. s.* 511.

† Quere, for the statute 13 *Geo. II.* c. 19, s. 7, applies only to the *Foundling Hospital*, and 9th *Geo. II.* c. 31. s. 8. to the *Magdalen Hospital*. See *Nolan's* Poor Laws, vol. I. 297.

‡ 5 *T. Rep.* 657.

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The KING *versus* the Inhabitants of BARNBY.

LAMBE then stated that the apprentice had served four years in *Barmby*, that his master died, and that having antecedently gained a settlement in *Barmby*, he went and resided there, and would be bound under other indentures.

Lord ELLENBOROUGH, C. J. "This is a service under other indentures, which cannot be connected with the antecedent service."*

GROSE, J. "The act of parliament is, 'if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such writing be delivered and published as aforesaid.' Now nobody can call this an inhabitation, his living with a grandmother, with whom he was sent to live during a period of sickness."

ORDER of SESSIONS QUASHED.
Original Order affirmed.

The KING *against* STEFFE CRISPE.—17th *May*.

A conviction, stating in the evidence, that the witness, being an officer of excise, went and surveyed the malt house of the defendant, on a certain day, in his presence, which is not contradicted, is sufficient prima facie *evidence, that the defendant was then a* maltster, *or maker of malt within the stat. 42. Geo. III. c. 38; for, survey is a technical term for examining the stock, &c. in an entered-house; the term for entering to discover frauds, being that of making a search; and he could not survey unless it was so entered.*

Conviction. Evidence. Malt acts. Stat. 42. Geo. III. c. 38.

The KING *versus* CRISPE.

A CONVICTION on the malt acts, stat. 42 Geo. III. c. 38, was as follows:

Suffolk, to wit. Be it remembered, that this 29th day

* The fact here alluded to does not appear in the case.

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The KING versus CRISPE.

of *May* in the year of our lord, 1805, at *Woodbridge*, in the county of *Suffolk*, *Richard Powell*, officer of excise, as well for his present majesty as for himself, now here exhibiteth to us, *Richard Frank*, doctor of divinity, *Samuel Kilderbee* and *George Turner*, clerks, three of his said majesty's justices of the peace, in and for the said county of *Suffolk*, residing near to the place where the offence hereinafter mentioned was committed, an information and complaint, and thereby informeth us, the said justices, that, before and at the time of the committing of the offence hereafter mentioned, one *Steffe Crispe* was a maltster and maker of malt, to wit, at *Wangford* in the said county of *Suffolk*, and, so being there such maltster and maker of malt, he the said *Steffe Crispe*, *within three months now last past, that is to say, on the 12th day of May now last past*, at *Wangford* aforesaid, in the said county of *Suffolk*, did wet, water, and sprinkle, and cause to be wetted, watered, and sprinkled, certain corn and grain of him the said *Steffe Crispe*, then and there making into malt, in a certain state and stage of operation, that is to say, while the said corn and grain so making into malt as aforesaid was a floor, after the said corn and grain had been emptied, thrown, and taken from and out of the cistern of him, the said *Steffe Crispe*, used by him for steeping the said corn and grain, and before the end and expiration of twelve days from the time when the said corn and grain had been so as aforesaid emptied, thrown, and taken from and out of the said cistern, contrary to the form of the statute in that case made and provided, whereby and by force of the statute in that case made and provided, he the said *Steffe Crispe* hath forfeited the sum of 200*l.*: and thereupon the said *Richard Powell* who prosecuteth as aforesaid, prayeth the judgment of us the said justices in the premises, and that the said *Steffe Crispe* may be summoned to answer the premises, and to

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The King versus Crisp.

make defence thereto before us the said justices, and that he the said *Richard Powell* may have one moiety of the said penalty and forfeiture. And, thereupon, *afterwards to wit on the 4th day of June*, at *Woodbridge*, in the said county of *Suffolk*, the said *Steffe Crispe*, having been previously duly summoned, in pursuance of our summons in this behalf issued, to appear before us the said justices, to make his defence to the said information, now here appears before us the said justices in his proper person; and having heard the said information read to him, he is asked by us, the said justices, if he can say any thing for himself, why he should not be convicted of the premises charged upon him in and by the said information, and, thereupon, he the said *Steffe Crispe* denieth the matters contained in the said information, and saith that he is not guilty thereof as is therein alledged. Whereupon we the said justices do now at the request of the said informer, proceed to examine into the truth of the matters contained in the said information, and, *thereupon, on the day and year last aforesaid*, at *Woodbridge* aforesaid, in the said county of *Suffolk*, *John Freeman*, officer of excise, and *W. Robinson*, officer of excise, two credible witnesses on the part of the said informer, now here come before us the said justices, and being duly sworn, (we the said justices having competent power and authority to administer to them respectively an oath in this behalf,) depose and say in the premises as follows, and first the said *John Freeman* on his oath for himself, saith, that he is an officer of excise, that the said *Steffe Crispe is a maltster at Wangford*, in this county, that he with the said *W. Robinson surveyed the malthouse* of the *defendant* at *Wangford* aforesaid, on *the said 12th of May*, and found *a floor of malt, in operation, very wet*; that the *said* floor of malt had been only four days out of the *cistern*, that the *said* floor had been watered since it was thrown from the cistern. And the

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said *W. Robinson*, on his oath aforesaid, for himself saith, that he surveyed the said malthouse with the last witness, on the said 12th of *May*, and he is sure that the said floor of malt has been watered since it was thrown from the cistern; that it had been out of the cistern only four days, on the said 12th day of *May*. And the said *Steffe Crispe* is no where again called upon by us the said justices for his further defence in the premises; but no other evidence is now here produced to us the said justices, whereupon, all and singular the premises being seen and mature deliberation being thereupon had, it manifestly appears to us, the said justices, that the said *Steffe Crispe* is guilty of the premises charged upon him, in and by the said information in manner and form as is therein alledged. It is thereupon adjudged by us the said justices, that the said *Steffe Crispe* be convicted; and he is hereby convicted of the said offences charged upon him as aforesaid, according to the form of the statute in that case made and provided, and we do award and adjudge that the said *Steffe Crispe* hath, for his said offence, forfeited the sum of 200*l.* but we do hereby mitigate the same to the sum of 52*l.* 2*s.* the said sum of 52*l.* 2*s.* to go and be applied as the law directs. In witness whereof, we the said justices to this record of conviction have set our hands and seals at *Woodbridge*, aforesaid, in the said county of *Suffolk*, this 4th day of *June*, in the year of our Lord, 1805.*

This conviction being removed into this court by certiorari, and a rule being obtained to shew cause why the same should not be quashed, several objections were taken to it, as follows:

* So many objections were taken to this conviction in point of form, that I have not ventured to abridge it; nor could I very easily condense the objections into a narrower compass.

1806.

The King versus Cleary.

ABBOTT, in support of the rule. "The information must be within three months after the offence committed, but it does not so appear either in the information or the evidence; and it ought to appear by both. Here it is uncertain whether the words 'now last past' apply to the month or the year; and although it is within three months last past, yet that will not do. An allegation that it is within three months is not sufficient, unless a day is mentioned which is within three months; for, although you need not state the precise day of the fact, yet there must be some one day stated, and that ought to be within the time."

LAWRENCE, J. "Then, when it is expressly stated to be within three months last past, we must infer that it is beyond twelve months past."

ABBOTT. "In the evidence it is still more informal; for it states, that *afterwards*, to wit, on the 4th day of *June*, the party appears, without stating any year."

LAWRENCE, J. "We are not got to the 4th day of *June*, 1806, and it is yet *afterwards*."

ABBOTT. "But the conviction must be good now, in the same manner as it would be ten years hence, or in the year 1807."

LE BLANC, J. "There is a date to the conviction."

ABBOTT. "The date is not the day on which the conviction is made, but on which it is sealed."

LAWRENCE, J. "Is it complete until they have signed and sealed it?"

LE BLANC, J. "Although they do not seal it on the same day on which they convict, yet they cannot seal it till after they have convicted."

ABBOTT. "The witness it is stated, went there on the

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The KING versus CRISPE.

said 12th of *May*. Evidence is given, as appears by the record, in the presence of the *defendant*, but it does not appear, that, in his presence, the record of the information had been read over; or that any 12th day of *May*, was mentioned to the witnesses in particular to which the word '*said*,' in the evidence could refer. Then it must be taken, that the witnesses only said, on the 12th day of *May* they went to the malthouse."

Lord ELLENBOROUGH, C. J. "If, in any case, a witness had been asked did he do any thing on the 12th of *May*, it would have been immediately asked also, what 12th day of *May* he meant; and must so be taken to be explained."

ABBOTT. "If it were a correct mode of drawing a conviction to state that 'the witness deposed, that on the day mentioned in the conviction, to wit, the 12th day of *May*,' then the objection is not founded; but that is not the proper way of stating the evidence. It must be stated according to the fair substance of the evidence; and if that cannot stand, if taken by itself, it cannot be incorporated into a reference to the previous information."

Lord ELLENBOROUGH, C. J. "It is taken down as he speaks with a reference to the premises. It is not a mere transcript of the words of the witness; for then it would be 'I,' in the first person. The premises in this case are the information. If there were a total omission of the reference, it would be the 12th day of *May* undefined, but here is a reference to the particular year."

ABBOTT then stated another objection, that it was not stated, that the evidence was taken in the presence of the *defendant*.

Lord ELLENBOROUGH, C. J. "The conviction

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states ' and the said *Steffe Crispe* is *now* here again called upon by us the said justices.' These words import sufficiently that it is in his presence; and, before, it is stated, that he pleads not guilty, 'whereupon we the said justices do now proceed to examine;' that is surely all at one time."

Abbott. "*Thereupon on the day and year last aforesaid*;—That must be, on the 29th of *May*, 1805, for there is no other day and year mentioned."

Lord Ellenborough, C. J. "*June*, which is the month mentioned last before, must be in some year, and it incorporates, by reference, into that sentence the year in which the month of *June* must be."

Abbott. "The evidence does not prove the *defendant* to have been a maltster at the time of the summons. It states, 'that *John Freeman*, on his oath says, that the said *Steffe Crispe* is a maltster;' but the *defendant* might have been a maltster on the 4th of *June*, and yet not a maltster on the 12th day of *May*. It also states "that he surveyed the malthouse of the *defendant*, on the said 12th of *May* and *found a floor of malt in operation very wet*; but it does not state, that it was the *defendant*'s malt which was then in operation, and a man may have a *malthouse* without being a maltster or maker of malt."

Lord Ellenborough, C. J. "Can a man have a malthouse without having it entered?"

Abbott. "In common parlance he might be the owner or landlord of a malthouse, and yet not a maltster at that time. The offence is the *wetting of corn and grain, making into malt*, before it has been a certain number of days out of the cistern: but this is stated to be a floor of *malt*, which is not *corn and grain* making into malt, but malt itself in a perfect state."

1806.

The KING versus CRIPPS.

Lord ELLENBOROUGH, C. J. "The words are 'a floor of malt in operation.' That cannot be *malt* made, in its perfect state. This is the inartificial language of the witness. The words are, throughout, 'the said floor of malt,' that is, of malt in a certain stage of operation; and we must carry to the construction of this conviction the common sense with which men construe ordinary language. If a man speaks of a floor of malt, *in operation,* he does not mean that which is actually malt."

ABBOTT. "Here it is stated only, that it had been only four days out of the *cistern*; but, according to the statute, it should be the cistern in which it had been steeped two days for being made into malt. This would be true, as it is stated, if it were taken out of some cistern, where it had been wetted for brewing only. It states here, that it has been wetted, but not for what purpose, and the act of parliament speaks only of corn and grain making into malt."

Lord ELLENBOROUGH, C. J. "Suppose a man says that he found another colouring a shilling; you would argue that it could not be a shilling."

FRERE, *contrà,* replied only to the objection that it did not appear that the *defendant* was a maltster at the time of the summons; that being the only objection with which the court considered him to be pressed. "The *defendant* must be taken to be a maltster at the time of the summons, or of the offence; for in the information, it is stated that he "was a maltster at the time of the offence hereinafter mentioned," and in the evidence it is stated that he is a maltster. In the *King* v. *Tucke,** on an information upon the statute 6 and 7 *W. III.* c. 11, against the *defendant* for profanely swearing he *non existens servus, nec laborator, nec miles,*

* 2 *Lord Raym.* 1386. 8 *Mod.* 366.

1806.

The King versus Cannaj

sed, ultima, existens generosus et ultra: sedecim annorum, &c. and the witness swore that *predictus Johannes Tuske* did swear, &c.* that was sufficient.

Lord ELLENBOROUGH, C. J. "He admits the description *generosus*, but I think that his age should be proved."

LAWRENCE, J. "According to that case there is nothing necessary but for a man to appear, and then he admits every thing which is charged against him."

Lord ELLENBOROUGH, C. J. "The words import a description of the person, and the qualification must be charged with an addition. When he appears, he admits the addition, as if he omits to plead in abatement, but he does not admit the age. The case is right to the extent of the word *generosus*; but wrong as to the qualification of the age. You have certainly got a bad case as to one point. It is stated that the witness *surveyed* the malthouse of the *defendant*: Could he survey any thing but an entered malthouse?"

DAMPIER, *amicus curiæ*. "They cannot *survey* unless it is entered. They do not call it a *survey*, if it is not entered; but only a *search*, to see whether the law is evaded or not. Survey is a technical term."

LAWRENCE, J. "In the case of the *King* v. *Stone*,† in which the court was divided as to their opinion, Lord *Kenyon* was of opinion, that, even of the negative of a qualification stated in the information, some *prima facie* proof should be given."

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* In the report in 8 *Modern*, 366, it is said that it shall be intended that he is a gentleman and also of 16 years of age, if so charged by the informer. It is said in the margin that the same case is to be found 5 Sess. Cases, 353.

† 1 *East*. 639.

1806.

The King versus Davies.

Abbott, in reply. "The informer is to make out his case by substantive proof. In the *King* v. *Tucke*, there is a penalty for profane cursing and swearing; the appearance is an admission of the addition gentleman, there is a higher penalty in that case, and all the rest applies to negatives in the act."

Lawrence, J. "No; the words of the act are 'being above the age of 16 years.'"

Abbott. "In this conviction the evidence states that the witnesses surveyed the malthouse of the *defendant*; but they do not say it was a malthouse entered by the *defendant*. A man may say; that he has surveyed a house or a malthouse, which might be as a surveyor. Survey is not so strictly a technical term as to imply the survey of an entered malthouse, by a regular legal survey. There is nothing to shew that it was a regular entered malthouse, or that the malt was his."

Lord Ellenborough, C. J. "If there were any thing to be supplied by intendment, I should be unwilling to supply it. I consider it as if this allegation, that he is a maltster, were omitted; as if it were only stated, that the witness on the 12th day of *May* surveyed the malthouse of the *defendant*. Then, it could not be his malthouse capable of being surveyed by law, unless it were entered, and the *defendant* could not even demise it, now, properly as a malthouse, strictly speaking, unless it were entered by him. The doubt is raised only by the conviction stating, that he *is* then a maltster at the time of the evidence given, whereas if it had been, that he was a maltster at any time previous to the survey, it would cast upon the *defendant* the *onus* of shewing that he has ceased to be a maltster. The evidence is foolishly stated, but I think there is sufficient to infer, that he was a maltster at the time. I

had considerable doubt at first, but I am glad to find, that the conviction can be sustained."

1803.

The King versus Cantis.

Grose, J. "We must, on the language of this man, 'that he surveyed the malthouse of the *defendant*,' understand, I think, that it was a malthouse entered by the *defendant*. If so, that is sufficient to shew, that he is a maltster. Then, it is proved that he being a maltster, the witness surveyed his malthouse, and this I think may be considered a fair interpretation of the evidence."

Lawrence, J. "I cannot say, but that I have my doubts upon the validity of this conviction. We are not used, by any sort of inference, to support these convictions. The way to consider it is, as if it had been said, and nothing more, that they went and *surveyed* the malthouse; but they might go without authority to do so. Merely using the word *survey*, does not so strongly imply that it was a malthouse entered by the *defendant*. According to my recollection of the cases, it is going a great deal further than we have ever gone before."

Le Blanc, J. "It strikes me that the evidence is sufficient to support the information. It need not be given in technical language. The information of the officer is that on the 12th of *May* he surveyed the malthouse of the *defendant*, he being present at the time. The question is then, whether the magistrate should infer *prima facie*, that it was a lawful entry to survey by the officer, technically speaking, of an entered malthouse; and if that is *prima facie* evidence uncontradicted, the conclusion will follow that he was a maltster on the 12th of *May*.

Rule discharged. The conviction affirmed.

1771.

The King against Goodrich.

Mandamus.

Mandamus to two arbitrators to appoint an umpire under a canal act.

The King *versus* Goodrich.

A MANDAMUS was issued to two arbitrators under an act for making a navigable canal as follows: *Monmouthshire*, *George* the Third, &c. To *John Goodrich*, Esq. and *John Kemeys Gardner Kemeys*, Esq. arbitrators appointed in pursuance of an act of *parliament* made and passed in the 37th year of our reign, intitled, "an act for extending the *Monmouthshire* canal navigation, and for explaining and amending an act passed in the 32d year of the reign of his present majesty for making the said canal," and to each of them greeting; *whereas* we have been given to understand in our court before us that after the passing of the said act made in the 37th year of our reign, and by virtue thereof, the said company of proprietors of the *Monmouthshire* canal navigation did carry the said canal across the *Pill*, in the same act mentioned, and to within 10 yards of the fence behind the fields therein mentioned, the friars fields; and the lands of *John Jones*, Esq. therein mentioned, and that at a special meeting of the said company holden pursuant to the directions of the same act, and of the said act therein recited on the 28th day of *May*, in the 45th year of our reign, being 12 months and more after the said canal had been completed to the extent aforesaid, and at which meeting there were present so many proprietors as were entitled to vote either as principals or proxies for and in respect of two thirds of the whole number of shares in the said navigation, and undertaking for which votes could then be given by the said company of proprietors, resolved that it was necessary, and expedient to proceed in and carry fur-

1805.

The King versus Goodrich.

ther the said canals, and for ascertaining the sufficiency or insufficiency of the land or ground which had been set out for wharfs, quays, and landing places, upon or adjoining to the said canal for the business carried on or done upon the said canal, the question whether the same was sufficient for such business or not was submitted and referred by virtue of and in the manner directed by the said act made in the 45th year of our reign to the arbitration and determination of you the said *John Goodrich* and *John Kemeys Gardner Kemeys*, you the said *John Goodrich* having been nominated for that purpose by the said company of proprietors, and you the said *John Kemeys Gardner Kemeys*, by the said *William Kemeys*, and that you the said *John Goodrich* and *John Kemeys Gardner Kemeys*, accepted of such reference and arbitration, and after such nomination, to wit, on the 19th day of *July*, in the 45th year of our reign did in due manner hold your first meeting in order to consider the question so submitted and referred to you as aforesaid, but that you the said *J. Goodrich* and *J. Kemeys Gardner Kemeys*, the arbitrators aforesaid, did not at such first meeting nominate or appoint any person to act as umpire in the premises, in the cases in the said last mentioned act mentioned, nor have you at any time since nominated or appointed any person to act as umpire as aforesaid, nor have you determined the question so submitted and referred to you as aforesaid but have wholly neglected and refused so to do to the great damage and grievance of the said company of proprietors as we have been informed from their complaints made to us, whereupon they have humbly besought us that a fit and speedy remedy may be provided in this respect, and we being willing that due and speedy justice should be done to the company of proprietors, (as it is reasonable) do peremptorily command you and each of you firmly injoining you that immediately after the receipt of

1808.

The KING versus COOMBES.

this our writ, you do nominate and appoint one other indifferent person to act as umpire for the determination of the question so submitted and referred to you by the said company of proprietors of the said canal navigation, and the said *W. Remcys* as aforesaid, or that you shew us cause to the contrary thereof, lest in your default the same complaint should be repeated to us; and how you shall have executed this our will, make known to us at *Westminster* on *Friday* next, after the morrow of the *Holy Trinity*, then returning to us this our said writ. Witness *Edward* Lord ELLENBOROUGH, at *Westminster*, the 7th day of *May*, in the 48th year of our reign.

Goodrich returned that they had met but could not agree upon an umpire; *Remcys* returned that at the meeting *Goodrich* proposed nine persons all of whom were interested, and that therefore he refused to join in the nomination of any one, and that he thereupon proposed eight others all disinterested, and *Goodrich* rejected them.

By the Court. "They must come to an agreement."

RETURN QUASHED.

A peremptory Mandamus granted.

The KING *against* DRAPER.—14th *May*.

Libel. Criminal Information. Affidavit. Practice.

Semble. *Although the truth of a publication is no justification, yet, if the court see, that it is true, or probably may be true, it may be good cause why the court should not interfere by granting a criminal information.*

Where the party applied for time to send to Trinidad, *for an affidavit of the truth of certain matters in a libel, in order to shew cause, against such a rule the court would not grant further time. Affidavits taken abroad before judges there, and verified, although receivable as affidavits of debts, are not to be received, on rules to shew cause, in opposition to affidavits made in this court.*

1806.

The King against Draper.

THIS was a motion for leave to file a criminal information against the *defendant*, the author of a libellous publication, entitled "An Address to the *British* public, on the Case of Brigadier General *Picton*, late Governor and Captain General of the Island of *Trinidad*, with Observations on the Conduct of *W. Fullarton*, Esq. F.R.S. and the Right Honourable *John Sullivan*." The application was made on the behalf of the latter gentleman, who was one of his majesty's privy counsellors, and late his majesty's under-secretary of state for the colonial department, in which office he was stated to have acted from *May* 1801 till *May* 1804. In *June* 1801, General *Picton* was, by commission under the great seal, appointed governor and commissioner in chief in and over the island of *Trinidad*. In *October*, 1802, *W. Fullarton*, Esq. and *Captain* now Sir *Samuel Hood* were appointed by his majesty's commission under the great seal, joint commissioners to take upon themselves the government of the said island. The above-mentioned pamphlet professed to state a letter from a Dr. *Lynch* to a Mr. *Gloster*, dated in the month of *February*, 1803, importing that Mr. *Sullivan*, in a conversation with the said Dr. *Lynch*, some time previous to the month of *December*, 1802, told the said Dr. *Lynch*, that in all probability, General *Picton* would be ordered to return to *England*, before six months; as Colonel *Fullarton* was instructed to investigate his past conduct, in *Trinidad*. And also, professed to state the copy of an affidavit, therein supposed to have been made by Dr. *Lynch* in *July* 1803, and verifying upon oath the above statement in the letter. The book also contained other strongly libellous matter against Mr. *Sullivan*, which was set out in the affidavit, but which it is not necessary nor proper to insert here.

1806.

The KING against DRAPER.

Mr. Sullivan, in his affidavit, declared, 'that he never did either directly or indirectly, inform the said Dr. *Lynch*, or any other person, either in conversation or otherwise, before the month of *December*, 1802, or at any other time, that, in all probability, General *Picton* would be ordered home, before *six months*, &c; and not only denied the fact, but stated, that he had no reason to expect the return of Col. *P.*; that he had no information that Colonel *F.* had any instructions, public or private, to revise Gen. *P.*'s conduct, or procure his removal; and that he recommended, and from letters and conversations with Colonel *Fullarton*; he expected and believed, there would be a perfect cordiality and co-operation between them. That he never took any step or recommended any measure to prejudice General *Picton*. Colonel *Draper*, in answer to this affidavit stated, that, since the application to enlarge the rule, he had stopped the publication; that he did not know the necessity of doing it till *Sunday* last, or would have done it earlier; that the original of Dr. *Lynch*'s affidavit and a letter addressed by him to Lord *Sidmouth* are deposited in the privy council office; and that he believed he should be enabled to obtain an affidavit from Dr. *Lynch*, verifying the facts in his above-mentioned affidavit, if time were allowed to write to *Trinidad*. That he believed him to be a person of unimpeachable integrity, &c. that unless he had believed him to be of integrity, &c. and to have sworn the said affidavit, he would not have published it. That he did not write or publish the above publication, or any part thereof, from any motives of malice against Mr. *Sullivan*. Mr. *Glaister* the attorney-general of the island of *Trinidad*, stated the conversation with Dr. *Lynch* in the island which led to the affidavit, and that he knew Dr. *Lynch* to be a gentleman of unquestionable honour, &c. And that in and subsequent to the month of *January*, 1803, reports were

1806.

The KING *versus* DRAPER.

frequently circulated and encouraged, that Mr. *Fullarton* had secret instructions to inquire into the past conduct of Colonel *Picton*. And further, that in the early part of that year certain secret investigations did take place upon oath respecting the conduct of Colonel *Picton*, as governor of the island, under the direction or superintendance of Mr. *Fullarton*.

BEST, Serj. MARRYAT, and GURNEY, now offered to have the facts verified by the affidavit of Dr. *Lynch* who was ready to swear to the truth of the facts stated.

But by the COURT. "The truth of a libel is no justification of it. If it be true and contain a charge of criminality, the party ought to be indicted for the fact or proceeded against by Colonel *Draper*."

BEST, Serjt. then urged that, as the court required the facts to be denied by the party applying for an information, so they might be affirmed by the opposite party; and, therefore, in that case, the court would not interfere by granting a rule for a criminal information, which is an application to the discretion of the court; that even if the facts were false, yet as the party was misled by a document of a public nature, the court would not interfere.

Lord ELLENBOROUGH, C. J. "Your application is to have an affidavit from *Trinidad*; but how are we to get that affidavit? Could we either compel him to make it, or empower any one to take it; or could we punish him for perjury, if it were not true, he being now in the island of *Trinidad*."

BEST, Serjt. then cited the case of *Dalmer* v. *Barnard*,* in which the court had received an affidavit, upon a rule to set aside an annuity, verified before the high bailiff of the *Isle of Man*.

Lord ELLENBOROUGH, C. J. "The denial of the fact is merely for a man to purge himself of the charge made against him; but it is not necessary for the

* 7 *Term Rep.* 252.

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granting of the rule. It must indeed have been adopted before the case of Sir *Francis Sykes*; but I do not know whether the court would hold a person so strictly to it in this case, as to try the fact upon conflicting affidavits. And a party who, upon such a supposed fact, chuses to spread about slander, ought to have the means of defence, and supporting the charge *in manu*."

MARRYAT urged that an affidavit taken before the magistrate, or chief officer of justice of the place, properly verified to be so taken, had never been refused in a summary application, and that it could not be required that he should be prepared with the affidavit, because it could not be read if it were taken before the rule, as the party making it could not, in that case, be indicted for perjury, if it were false. And, that it is quite clear, that it is a sufficient answer to an application for a criminal information, that there is a suspicion that the person applying for it has not conducted himself properly.

GARROW, *contrà*, observed shortly, that the *defendant* was in the situation which he desired to be placed in by his counsel; for the prosecutor denied the fact, 'in the said supposed affidavit,' and, if he had the affidavit which he required, he could not be in a better situation.

Lord ELLENBOROUGH, C. J. "Is it not an aggravation of the offence, that there is an application before the privy council, for the investigation of a criminal charge, and that the affidavit is before the counsel board? I will suppose, that the affidavit of Dr. *Lynch* sworn in the island, was sworn since this rule; yet I am at a loss to know how it could be received, or, if received, how applied to this case. First, it could not be received as affidavits are to hold to bail, for they are received not as influencing the jurisdiction of the court, but as actuating the judge to give an order to hold to bail. But, on what principle is an oath so informally taken to be put in competition with an oath made by a party who is criminally responsible for that which he states? Then, the party applying for the infor-

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The KING *versus* DRAPER.

mation has complied with the rules of the court, which, in order that we might not be occupied about objects unworthy of us, require, that the person applying shall falsify the abuse, except where the party himself is abroad, or where it is of so general a nature that it cannot be denied. Many of these things are incapable of being denied, and if it were even true that *Sullivan* had informed *Lynch*, that there was a prospect that *Picton* might be recalled, how could that be an excuse for all the collateral abuse? For he takes this merely for his *text* and branches out into a great deal of substantive calumny of his own. If Mr. *Lynch* made the same affidavit which it is said he will make, it could not affect this case; although I will not say that the court will not, in any case, refuse to grant the rule, where it appears to be for a charge which is really not false and which it would not be proper for us to interfere in. In cases of holding to bail it seems similar proofs of affidavit may be admitted but not in a case of a criminal nature. If this were laid down even as a cause for delay only, in what case might not the party put off the information? He might always state 'it was written to me' or, 'I heard it from a man in foreign parts,' and pray the court to delay it till he had got his affidavit."

GROSE, J. "This application for a criminal information is very properly brought forward. But what is the object of this affidavit? Is it that we are upon affidavits to try the truth of the book? We never refuse the rule in these cases, if we are perfectly satisfied that it is a libel, and the party who applies says it is not true. I do not agree with what my brother BEST has stated, that, if a man has a well grounded reason to believe that his accusation is true, he may publish it. I should expect of a libeller, that he should know that the thing was true, before he called upon us to withhold our interposition on behalf of the person whom he is injuring."

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LAWRENCE, J. "What is desired in ordinary cases is to shew, by denying the fact, that there is no truth in the charge; otherwise it might be of too light a nature for the court to interfere. But the application is now made for us not to interfere, until an answer can be had from the *West Indies*. Now we require that the party should deny the charge in the libel; he has done so here; and there is this peculiarity in the case, that the party now applies for leave to state that, which the other party would be in no situation to deny, if it went to defeat his right to the rule. The libel is not merely that he did tell *Lynch* that Col. *Fullarton* had a commission to inquire into the conduct of Colonel *Picton*, for I have some doubt, at least, whether if he contented himself with saying that *Sullivan* said that to Dr. *Lynch*, it would be a libel, though he publishes this of a man in a high situation: but all this will not affect the case in the least, for there is other matter which has nothing to do with this. I think, however, that the rule must be as Serj. BEST says, that, if the party is ready to bring forward his affidavits, the court may inquire whether the matter is true, and, perhaps, then they will not grant the information. But it is very different where he requires time for a *mandamus* to have that, which, if brought, would not be of any avail."

LE BLANC, J. "This is an application to the discretion of the court whether it will grant further time to procure an affidavit. The court must then take into its consideration whether it is such an affidavit as it will put in the opposite scale against the affidavit which is then before them. The affidavit proposed to be taken before the judge of the island ought not to be suffered to contradict and to weigh down the affidavit taken in a regular judicial proceeding."

RULE ABSOLUTE.

1806.

LUBBOCK *against* CLAGGETT. SAME *against* POTTS.
Nov. 28th.

Where, upon the trial of one of several causes which were consolidated, there was a rule nisi *obtained for a new trial, on a point of law reserved, and the* defendant *agreed to abandon it, the* defendants *in other causes were permitted upon motion to have the name of another* defendant *inserted in his place in order where the benefit of the rule to shew cause.*

Insurance. Consolidation rule.

IN these cases, which were actions upon a policy of insurance, the *plaintiffs* had obtained a verdict against the *defendant Claggett*, and the *defendant Potts* had previously obtained a rule to consolidate the actions, and agreed to be bound by the verdict. A rule was obtained in *Michaelmas* term in the name of *Claggett*, to shew cause why the verdict should not be set aside, and why there should not be a nonsuit entered upon the ground of illegality in the voyage, the same being contrary to the *navigation* laws. Upon this, *Claggett*, who disliked the defence, agreed to settle the loss, the original and first ground of defence having been that the loss itself was fraudulent. *Claggett* and others therefore signed a letter authorizing the *plaintiffs* to receive exchequer bills for the loss, and disclaimed, taking any advantage of any legal objection, and upon an affidavit of these circumstances;

LUBBOCK *versus* CLAGGETT.

The SOLICITOR-GENERAL* and GARROW shewed cause against the rule for entering a nonsuit, and agreed, that, if others of the under-writers were desirous of litigating the question, the consolidation rule might be opened, and they might be permitted to make their objections in point of law.

* Sir *V. Gibbs.*

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LUBBOCK versus CLAGGETT.

ERSKINE and PARK were of counsel for the *defendant, Potts,* and other under-writers, and there was much difficulty as to the costs.

Lord ELLENBOROUGH, C. J. at first thought that *Claggett* and the two others, who had been *defendants* in the cause which was tried and agreed to pay debt and costs, should pay costs up to the time of making the motion for a new trial, and considered all the *defendants* as making a defence in partnership up to that time: that they might withdraw themselves from all liability from the present time but not previously. At length it was seen that there would be great difficulty in adjusting the proportions of costs; and his lordship said, after consultation with the rest of the court; "I think it will be most convenient, at present, to discharge this rule, and you must afterwards move to open this consolidation rule on such considerations as may be made to appear, and to apportion the costs in such a way as the court shall think proper, on that application, when the facts are before us. It will be very difficult to arrange the costs, but perhaps it may be laid before us at another time, and in the *defendants* arranging their defences, all waste of expence ought to be avoided, if it can be avoided, unless you can arrange it by consent. Here the *plaintiff* shews that the motion for the entering of the nonsuit was made without the consent of the *defendant Claggett.*"

RULE DISCHARGED.

Afterwards a rule was made to discharge the rule for the new trial in this cause, and it was further ordered, that the name of *James Potts* be inserted in the rule made in this cause, on *Monday* on the feast of *St. Martin,* in the said *Michaelmas* term, instead of the present *defendant Clagget,* and that the cause against

1806.

LUBBOCK *versus* CLAGGETT.

the said *James Potts* be advanced and placed in the same condition as that against *Claggett* would have been if the said rule of *Thursday* next after fifteen days of *St. Martin* had not been made, and, that the consolidation orders when made rules of this court, shall apply to such *defendants* as do not withdraw themselves from the defence; and that the *plaintiffs* and such *defendants* respectively shall be entitled to such and the like benefit of the decision, which may take place in the cause against the said *James Potts*, as if the same had taken place in this cause, and, that the *plaintiffs* be at liberty to take their costs, and sign final judgment in this cause against such of the other *defendants* as do withdraw themselves from the said order.

THE END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN TRINITY TERM,

In the 46th Year of the Reign of Geo. III.

LUBBOCK *against* POTTS.—*June 8th.*

An insurance of British property, from all risks whatever, British capture, seizure and detention included is, legal; for it may be intended to guard the assured against unlawful or occasional seizure and detention; aliter, *if enemy's property.*

Colonial produce of the plantations cannot be transported from thence direct to Gibraltar or any place in Europe, under the stat. 12. Car. II. c. 4, s. 8, &c. called the navigation acts, and an insurance upon a ship on such voyage, with colonial produce, is illegal, and there can be no return of premium.

Insurance. Britishcapture. Plantations. Stat. 12 Car. II. c. 4, s. 8. Navigation laws.

1806.

LUBBOCK *versus* POTTS.

IN an action upon a policy of insurance on ship and goods, *British* property, at and from *Trinidad* to *Gibraltar*, with liberty to touch ship and exchange property at any one of the *West India* islands, particularly *Martinique*, against all risks, *British* capture, seisure, and detention, included, loss by perils of the seas, which was tried before Lord ELLENBOROUGH, at Guildhall in the sittings after *Michaelmas* term last, several questions were made; first as to fraud, which was given up, and next as to the legality of the policy, and lastly, as to the legality of the voyage under the navi-

† See also St. 25 *C. II.* c. 7; 3 and 4 *Ann*, c. 5. s. 12; 8 *Geo. I.* c. 18. s. 22; 4 *Geo. III.* c. 15, s. 27.

1806.

LUBBOCK versus POTTS.

gation acts. And a verdict was taken for the *plaintiffs* reserving the point as to the legality of the exception from *British* capture, and afterwards a rule was obtained to shew cause why the verdict should not be set aside and a nonsuit entered. The exception against British capture was added, subsequently to the making of the policy, as follows, " I hereby agree, in consequence of the above mentioned letter," a letter wherein the correspondent was desirous of being made secure against all risk, " and in consideration of five guineas per cent, additional premium, to insure against all risks whatever, *British* capture, seizure, and detention included." The ship went first from *Gibraltar* to *Martinique* with fruits and wine, and thence to *Trinidad* and took in sugar and coffee, plantation produce, and afterwards sailed for *Gibraltar*, and was lost in her voyage thither. She cleared out for *Cork* and *London*.

By statute 12 *Car. II.* c. 4. s. 18. No sugar, tobacco, cotton, &c. or timber of the growth, production, or manufacture of any *British* plantation in *Asia*, *Africa*, or *America*, may be transported to any place whatsoever, other than to some *British* plantation, or to *Great Britain*, or to *Ireland*; upon penalty of forfeiting the ship and goods: and it was now contended that, as this was an illegal voyage, and the ship and goods might have been forfeited, the *plaintiff* could not recover in this action.

Sir VICARY GIBBS and R. CARR shewed cause, and contended, first, that the insurance might well be against *British* capture, seizure, and detention, because property is sometimes taken by mistake by *British* seisure, or taken by privateers, and afterwards delivered up, and insurance against such risks cannot be unlawful, although, if the property insured were foreign pro-

perty, to insure against *British* capture would necessarily be unlawful.

Lord ELLENBOROUGH, C. J. "If the words can be understood in a limited sense which is authorised, then you might insure on it, against such capture. In *Kelner* v. *Le Mesurier*,* the property became enemy's property, and it was held that if an insurance against *capture* generally should be an insurance against that, which, if the party had inserted it in terms would not have been legal, then it could not be a valid policy."

PARK, for the *defendant*, observed that the detention of *British* property, was not a loss within the terms of the policy, if it was an unlawful detention.

LAWRENCE, J. "Is there any case to shew, that if there is any ship seised and carried into a court of admiralty, and afterwards given up, the party may not protect himself against a loss and damage to accrue thereby; the case you allude to is where a vessel is seised by the order of the government."

PARK. "In *Kelner* v. *Le Mesurier*, it is said expressly a policy against *British* capture, *eo nomine*, would be clearly illegal as directly against the interest of the state."

Lord ELLENBOROUGH, C. J. "But an insurance of what? Of enemy's property. All words are to be understood *secundum subjectam materiam*."

LAWRENCE, J. "That means authorised British capture."

Sir VICARY GIBBS and CARR then proceeded to consider the question raised upon the construction of the navigation acts, and contended that the word

* 1 *Smith's Rep.* 72.

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plantation in these acts must mean not only such plantations as were in the possession of the crown of *Great Britain*, at the time of making the act, but also such as should be acquired afterwards; for, otherwise, the converse of that proposition would also follow, and there would be no restraint against importation from a colony or plantation, which was not then in the possession of his majesty. That it might, indeed, be argued, as it was upon the motion for the rule to shew cause, that under these words, the goods could not be carried to *Scotland*, and that it would be absurd to allow a privilege of carrying that to *Gibraltar*, which was not to go to *Scotland*: but, it might be considered, by the legislature, upon some other ground of policy, improper to import direct to *Scotland*, as at that time *Scotland* was governed by a parliament of its own.

Lord ELLENBOROUGH, C. J. "Have you found any act of parliament in which *Gibraltar* is called a plantation. Plantation is taken through all the acts of parliament to mean a colony established for the purpose of planting and growing certain commodities, the natural or suitable growth of the soil there, as a subject of commerce; here they can only plant vegetables.* I wish you could find any thing to support your construction."

By the COURT. "These places such, as *Gibraltar*, *Jersey*, *Guernsey*, and others, are forts and not plantations; and, upon its being suggested that no penalty could be incurred because the goods were not landed, the *Court* observed that the penalty attaches upon the goods being shipped."

* It was mentioned in the argument that "they might plant soldiers there." In that case, how pointedly do the lines of *Goldsmith*, in his *Traveller*, apply:

No product here the barren *rock* affords,
But man and steel; the soldiers and *their swords*.

Sir VICARY GIBBS, then attempted to establish a claim for a return of premium, there being no risk run whatever. 1806. LUBBOCK *versus* POTTS.

But, upon the cases of *Hewett* v. *Vandyke*,* *March* v. *Abell*,† and other cases, it was held by the court, that, being upon an illegal insurance, there could be no return of premium.

Lord ELLENBOROUGH, C. J. "There is a provision that it is illegal from the moment that the goods are shipped on board; the forfeiture is only in case of their being landed on shore."

RULE ABSOLUTE.

BOURN *against* RAWLINS.—*June* 7th.

Where, in a manor, the copies of admissions were anciently 'to hold of the lord according to the custom of husbandry of the said manor,' but other copies were to 'hold at the will of the lord' also, and all the modern copies were so; held that this land was copyhold and not customary freehold. Copyhold, Customary freehold.

THIS was an action of trespass in breaking and entering the close of the *plaintiff* at *Backworth*, in the county of *Northumberland*, and breaking up the soil there; to which the *defendant* pleaded first not guilty; *secondly*, that the close in the declaration was the close, soil, and freehold of the Duke of *Northumberland*, and justified as the servant of the *duke*; and *thirdly*, that the *duke*, at, &c. was and still is seized, in his demesne as of fee, of and in the manor of *Tynemouth*, otherwise *Tynemouthshire*, in the said county, whereof as well the close aforesaid, as divers, to wit, 1000 acres of land in *Backworth* aforesaid, then were and still are, BOURN *versus* RAWLINS.

* 1 *East*, 96. † 3 *Bos. and P.* 35.

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and from time immemorial have been parcel and a copyhold tenement of the said manor, demised and demisable by copy of the court-rolls thereof, by the lord of the said manor for the time being, &c. at the will of the lord of the said manor, according to the custom of the said manor; and the said *duke*, being so seized of the said manor, whereof, &c. was by reason thereof entitled to all mines and veins of coal under the said close, &c. parcel, &c. wherefore the said *defendant* as the steward of the said *duke*, entered and by his command dug for coals, &c. The *defendant* replied, taking issue upon the plea of not guilty, and as to the first plea in bar, being the second plea above-mentioned, replied, that Sir *Matthew White Ridley*, Bart. before and at the time when, &c. was and still is seised of the said close, in which, &c. with the appurtenances, parcel of a customary tenement from time whereof, &c. holden by copy of court-roll of the manor of *Tynemouth*, otherwise *Tynemouthshire*, with the appurtenances in his demesne as of fee, according to the custom of the said manor; that the said Sir *M. W. Ridley*, demised for a year to the *plaintiff*, who entered and was possessed, &c.; that the *defendant*, *de injuria sua propria*, committed the said residue of the trespasses; and traversed, that the said close in which, &c. now is, and at the said several times when, &c. was the close, soil, and freehold of the said *duke*, in manner and form, &c. and as to the second plea in bar, being the third plea, the *defendant* replied as before, that Sir *M. W. Ridley*, was seised in his demesne as of fee of the close as a customary tenement, and demised to the *plaintiff*, and concluded with a traverse that "as well the said close, in which, &c. as the said other lands in *Backworth* aforesaid, in that behalf mentioned, were and are, and from time immemorial have been, parcel and a copyhold tenement of the said manor, demised and demisable the copy of the court-rolls

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thereof, by the lord of the said manor, for the time being, or by his steward of the court of the said manor, for the time being, to any person or persons willing to take the same in fee simple, or otherwise, at the will of the lord of the same manor, according to the custom of the same manor, in manner and form, &c. and in the replication issue was taken on the first plea in bar, that the *locus in quo*, was the close, soil, and freehold of the *duke*; and also, upon the traverse in the second, that the *locus in quo*, and the other land was copyhold, parcel of his manor, and held at the will of the lord.

The cause was tried at the last assizes for the county of *Northumberland* before CHAMBRE, J. The real question in the cause was between the Duke of *Northumberland*, and Mr. *Grey*, of *Backworth*, for whom Sir *M. W. Ridley* was a trustee under his marriage-settlement, and the question was, whether the *duke* was entitled to the coal mines under the estate, which he would be, as being lord of the manor, if it were copyhold; or whether the customary tenant was entitled, which he would be, if it were not copyhold held at the will of the lord. And, at the trial, it was proved, on the part of the *duke*, that his ancestor's title commenced by grant, by letters patent of the 16th of *March*, 9 *Car. I.* A.D. 1668, whereby the king granted unto *W. Scriven* and *Philip Eden*, Esqrs. and their heirs *inter alia* the manor of *Tynemouth*, otherwise *Tynemouthshire*, by the description of all that our lordship called *Tynemouthshire*, in our county of *Northumberland*, with all and singular its rights, members, and appurtenances, &c. and all our lordships, manors, towns, &c., *inter alia*, of *Backworth*, lately parcel of the lands and possessions of the monastery of *Tynemouth* in the said county; that is to say, *inter alia* all those ten tenements of husbandry, with the appurtenances, in *Backworth*, now or lately in the several tenures of A. B. &c. or some of them, at the

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Doe on dem. Rawlins.

will of the lord, by the particulars thereof mentioned to be of the annual rate or value of 10l. &c. excepting the mines of coals and veins of coal within the lands, grounds, and fields of *Murton Bellimore* and *Bellimulmore*, otherwise *Killenworthmore*, and all advowsons: *to hold* to them in fee, as of the manor of *East Greenwich*, in the county of *Kent*, in free and common socage. That, by bargain and sale dated *August* 2d, 1633, the same premises were conveyed to *Henry Taylor* and *Thomas Cartwright*, in fee, *to hold* as aforesaid; and by bargain and sale, *March* 16th, 1640, they the said *H. T.* and *T. C.* conveyed to *Algernon*, Earl of *Northumberland*, and his heirs, stating that they were only trustees for him; and from him the present duke claimed. That by the *minister's accounts* which were produced from the augmentation office, taken from the 30th to the 31st *Hen. VIII.* A.D. 1540, they were stated as follows "*Tynemouth*," account of *Backworth, Thomas Dynevand*, collector of the rents, of rent of certain lands in *Backworth, at the will of the lord.* The court-rolls of the manor were produced, the oldest of which were in 1662, containing admissions of several tenants, viz. *Weedon, Calla, Gosswick*, and *Dynnands*, to hold at the will of the lord. One of the admissions was as follows, 1663. *Oliverius Ogle, tenens customarius hujus manerii, qui de domino tenuit unum custumarium tenementum in* Backworth, *infra menerium de* Tynemouth, &c. *in*, &c. *sursum reddidit, in manus domini, per manus, J. C. et B. P. 2 Cust. tenent, secundum consuetudinem ejusdem manerii ad opus et usum predicti Radulpho Hæredibus et assignatis suis, unde ad curiam prædictus Radulphus venit et petit se admitti tenemento: et concessit ei habend. et tenend sibi et heredibus suis ad voluntatem domini*, &c. subject to certain services. The rolls were also produced from 1464 to the present time, and amongst other the following; 18th *April*,

1677, in *Latin*, the homage present, that "*Ralph Grey* a customary tenant of this manor, died seized of six several customary tenements at *Backworth*, and thereupon, in the same court, *Ralph Grey* prays to be admitted tenant thereof. To which said *Ralph Grey*, the lord by his steward hath granted seisin thereof, to have, and *to hold* the seven separate tenements aforesaid, to him and his heirs according to the custom of husbandry." Other admissions of the like nature were read of the 16th of *April*, 1679, 1684, and 1687, of the ancestors of Mr. *Grey*, to hold at the will of the lord, according to the custom of the manor; and on the 17th of *April*, 1777, *Matthew Bell* by the desire of *R. Grey*: surrendered to Sir *M.W. Ridley* and another, their heirs and assigns, according to the custom of the manor; and they are admitted at the will of the lord."

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And on the 25th of *April*, 1771, Mr. *Grey* was on the homage, when a person of the name of *Bell* who was a trustee, with his direction, surrendered, into the hands of the lord, a customary tenement, to hold at the will of the lord, according to the custom of husbandry of the manor.

This was the documentary evidence from the court-rolls. It was then proved by one of the witnesses, the steward, that no copyhold tenant ever bored for coals in the manor of *Tynemouth*, in his own right, and he must have known if such a thing had been done. A person who had been agent for 30 years said he knew no instance of a copyholder in *Tynemouth* having bored for coals. Mr. *Grey* himself had tried to dig for coals some 13 or 14 years ago; but it was in his own freehold; that this property was in the nature of copyhold not freehold, and that he believed there were coals in *Backworth*. Another witness then produced a lease dated 1713, whereby the Duke and Duchess of *Somerset* demised to *John Atkinson* all coal pits, coal mines,

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open and not open, lying under certain lands within the township and territories of *Whitley* (which is another of the townships in the manor of *Tynemouth*), at a rent of 100l. whether wrought or not; and other leases were produced of different dates, of coal mines in the townships of *Preston*, and a lease 24th of *September*, 1775, from the Duke of *Northumberland* to *H. Hudson* of *Whitley*, in consideration of the surrender of the former lease, of limestone quarries within and under the copyhold tenement of the said *Hudson* called *Whitley park*, with an exception of a way leave to the duke, to his other mines, at a rent of 250l. which rent had been received.

On the part of the *plaintiff* was produced a decree of the court of Exchequer in *Easter* term, 39th of *Eliz. April* 14th, stating that the complainants by their bill alleged that they and their ancestors, time out of mind, had been seised of several tenements within *Chirton*, *Preston*, *Whitley*, *Monkseaton*, *Murton*, *Earsdon* and *Backworth*, in *Tynemouthshire*, in the county of *Northumberland*, and held the same some time of the prior of *Tynemouth*, and since the dissolution thereof, of her majesty by copy of court-roll according to the custom, of the manor of *Tynemouth* paying their rents, doing their services upon the borders, and for the defence of *Tynemouth* castle from invasion, at their own charges. It then stated, that they paid one half their rents in corn by the *Winchester* bushel, until one *Peter Delaval* and other farmers of her majesty compelled them to pay by the *Newcastle* bushel. *Delaval* in his answer, alleged, that the queen was seised of the manor of *Tynemouth*, in fee, and of certain tenements in *Preston*, &c. and *Backworth*, as parcel of that manor, which were holden by certain rents by copy of court-roll, according to the custom, paying their duties and services, and granted the same to the late earl of *Northumberland*; and that he, as servant to the Earl, and by his commandment, demanded the rent, accord-

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ing to the said *Newcastle* measure. The decree directs the *Winchester* measure to be the proper measure. There was produced in evidence also an act of parliament passed in 7th *James I.* whereby it was enacted, that all the messuages, cottages, mills, lands, tenements, and hereditaments, contained or mentioned in any decree in the court of Exchequer, since the 1st day of the then sessions of parliament, or within three years after, to be good and perfect copyhold lands, should, from the time of such decree or decrees made, be taken and adjudged to be good and perfect copyhold lands, tenements, and hereditaments, according to the true intent and meaning of the said decrees respectively; and, that all and every person and persons, should, and might have, hold, and enjoy the said messuages, &c. to them their heirs and assigns for ever, by copy of court roll or otherwise, according to the custom of the said manors, severally and respectively, according to the purport and effect of the said decrees, for such fines, rents and duties, and by, with, and according to such customs, privileges, liberties, profits and commodities, in such manner and form as in and by the said decrees should be limited and appointed, and, that such decrees should stand and be of force, and conclude the king his heirs and successors, and also all other parties to the same, their heirs and assigns, and all claiming under them in all things, according to the purport, effect, and true meaning of the same decrees; and that every thing therein contained should for ever stand, be, and remain, and be adjudged and taken to stand and be of such and the same force and effect to all intents and purposes, as if the same decrees were in the said act expressed and enacted.

Easter Term, 8 *Jac. I. 2d April.* By a decree in the court of Exchequer, stating that *Robert Anderson*, *Peter Riddell*, and others, his majesty's customary

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tenants, and copyhold tenants within the said townships of *Monkseaton*, *Preston*, &c. all parcel of his majesty's manor of *Tynemouth* aforesaid, as well for themselves as also in the name and behalf of the residue of his majesty's customary and copyhold tenants within the said townships, exhibited their petition to his majesty, wherein they affirmed and maintained they were copyholders of inheritance of several messuages, lands, and tenements, within the said several townships, parcel of his manor of *Tynemouth*, and that they and those under whom they held the same had been severally seised thereof, of several estates of inheritance, according to the custom of the said manor; and that there was, and from time, &c. there had been, certain ancient customs, within the said several townships for and concerning the payment of fines, for admittance to the said copyhold messuages, lands, and tenements in the said township, holden by copy of court roll according to the custom of the husbandry of the said manor, upon any descent surrender and alienation, (that is to say) that every tenant holding in present possession of the said manor by copy of court-roll, as before, any messuages, lands, or tenements, within the said several townships of *Monkseaton*, *Preston*, *Backworth*, *East Chirton*, *Whitley*, *Murton*, and *Earsdon*, have used and been accustomed by all the time aforesaid, to pay, upon every admittance to any the copyhold messuages, lands, or tenements, within the said townships, if it were upon descent, ten pounds, and if upon alienation, surrender, or any other alteration 4l. for a fine and no more; and, thereupon, desired of his majesty to be relieved of sundry wrongs and injuries done to them by the inferior officers and ministers of the said manor, to the impeachment of their said several customs and rights; and stating, that the petitioners were by reference from his majesty called before the court of Exchequer, when they persisted to

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maintain their said several copyhold estates of inheritance, and customs for such certainty of their said fines, and besought the court therein, as also, for that, by reason there had been some difference of the latter times, in the forms of their surrenders and admittances, far differing from their former precedents, and also in the assessing of their fines, which might be prejudicial to their posterity if not reformed; and in respect of the ancient court-rolls and evidences for part of the said estates of inheritances, and the certainty of the said fines was then lost, embezzled, and no where to be found, the court thereupon gave direction and order, that, seeing the court-rolls of the said manor were not to be found, that as well ancient as late copies and what other evidences or testimonies for approving the said estates of inheritance and the certainty of their said fines, by the said tenants could be shewn or alledged, might be perused, viewed, searched, and examined. And, for as much as by the due examination, perusal, view, and search of the said customs, copies, thereupon, and other testimonies by the said tenants shewn and allowed, and proved, upon consideration thereon it evidently appeared to the said court, that the said copyholders were copyholders of inheritance, and that the ancient customs for and concerning the payment of fines, were as the tenants had alledged; therefore, upon the petition of the said petitioners who had voluntarily paid to his majesty 789l. 13s. 4d. and humbly desired that they and the rest of the said customary and copyhold tenants, for their better satisfaction, evidence, and declaration of their ancient rights and customs, might have some record thereof, in the said court to remain to all posterity; it was ordered, adjudged, and decreed, by the court, that the said ancient rights and customs of the said townships, for the said estates of inheritance, and certainty of fines as aforesaid, were true; and, that, the said copyholders were and always had been copy-

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holders of inheritance; and so from thenceforth should be, and, that the said petitioners and all others his majesty's copyholders in the said townships should from thenceforth, severally have, hold, and enjoy to them and their heirs the said several messuages, lands or tenements, in the said several townships within the said manor, as copyhold and customary tenants thereof accordingly; and for the same, for ever hereafter, should pay to the king, his heirs, and successors, for admittance upon descent, &c. as before expressed, and should, for ever thereafter, have, hold, and enjoy all other ancient customs, &c. theretofore used and accustomed within the said townships, to them and their heirs for ever; and that the forms of their copies, surrenders, and admittances should be according to such precedents thereof, as were most commonly used before the 20th year of Queen *Elizabeth*. *Easter Term*, 12 *Jac. I.* By order of the court of Exchequer of this date, after reciting, that in *Easter Term*, in the 8th year of his majesty's reign, upon the humble petition of his majesty's customary and copyhold tenants of his majesty's manor of *Tynemouth*, and upon a fine and voluntary composition made by them, for their better satisfaction, evidence, and declaration of their ancient rights and customs, it was, amongst other things, then ordered, adjudged, and decreed, that their copies, surrenders, and admittances should be according to such precedents thereof, as were most commonly used before the 20th year of the late Queen *Elizabeth*. And, for as much as the Earl of *Northumberland* his majesty's steward of the said manor of *Tynemouth*, had certified under his hand, that the form of the copy annexed unto this order was the accustomed form of making the copies, within his majesty's said manor of *Tynemouth*, for such tenements as are admitted after death; it was ordered, that the said form hereafter-mentioned, should stand as a precedent for copies

hereafter to be made, for such tenants within the said manors as should be admitted after death.

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Manerium de Tynemouth ss. Cur. Baron. Serenissimi Principis Dni Jacobi, dei gra. Anglie, Francie, et Hibernie, Regis, Fidei Defensor, &c. tent. ibidem, &c, ad hanc Curiam psentatū est per homagium quod E. G. Custumar tenens hujus manerii unius Messuagii in *Elstwicke*, et centum et quadraginta acrarum terræ, sive plus sive minus cum ptīnen in *Elstwicke* præd, tent: de dno hujus manerii ut de manerio, obiit citra ultimam curiam, et quod T. G. est filius ejus et proximus heres, ætatis xxi ann: et amplius, et nunc, in eadem cur. venit prædict: T. G. et. pet. admitti mess: et terr: præd: cum ptin; cui dominus Rex per Senescallum suum concessit ei inde seisinam, habend: sibi et hered: suis secundum consuetudin. husbandrie manerii prædicti faciend: et reddend: inde reddit: servic: et consuetud inde prius debit, et consuet. et dat, dnō de fine, &c, fecit dnō fidelitat, et admissus est inde tenens, &c.

In addition to these several old copies of admissions were produced, viz. 13th *November*, 17 *Eliz.* whereby one *J. Danyson* took of the lady the queen, one tenement of husbandry with the appurtenances in *Backworth* to hold to him for life according to the custom of husbandry there. Another in a similar form 23d *January*, 38 *Eliz.* Also, 16th *April*, 43 *Eliz.*, admittance of J. G. to hold to him, his heirs, and assigns, according to the custom of the manor there; and two other admittances of a similar purport; 22d *April*, 4 *Charles I.* Admittance of *Ralph Grey*, *Habend.* to him and his heirs, according to the custom of the manor, 3d *April*, 2 *Charles I.* Admittance of *R. O.* to hold to him and his heirs according to the custom of the husbandry of the said manor. 22d *October*, 14 *Car. I.* Admittance of *Ralph Grey* to hold to him and his heirs according to the custom of the husbandry of the said manor. But in other subsequent admittances the following words are used: "At the will of the lord

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according to the custom of the husbandry of the said manor." At a court baron of the Duke and Duchess of *Somerset*, held at *Tynemouth*, for the said manor on *Wednesday*, 10th *March*, 1685-6 the jury being charged to enquire what the particular customs belonging to the said manor were, and what duties, rents, and services were or ought to be paid to the lord of the said manor, found that all the copyhold estates within the said manor, were copyhold estates of inheritance, according to the custom of the said manor; and if any copyholder should die seized of any copyhold estate, leaving a wife, that she should enjoy such copyhold estate, during her widowhood only, by virtue of her husband's copy, without paying any fine to the lord or taking any admittance. And that, after the death or marriage of the widow, the said copyhold estate should descend and come to the eldest son of the said copyholder, and to take a copy thereof at the next court held for the said manor upon such admittance by descent to pay to the lord 40s. for a whole farm, 20s. for half a farm, and 10s. for a quarter of a farm. If he should die without issue, the second son to take a copy and pay such fine as before-mentioned; and so from son to son; and for lack of sons to the eldest daughter of such copyholder, for life only, paying 4l. for a fine of a whole farm, and so proportionally; and so to descend and come to the next heir male in succession.

The court-rolls of the manor, in the hands of the Duke of *Northumberland*, began so late as the year 1674, and it was alleged that the former rolls were not to be found, but the first book containing the rolls of surrenders was marked No. 3, and that containing the rolls of admissions was marked No. 2, shewing that former rolls existed at the time of commencing these books. From the roll of the surrenders it appeared that they were all made nearly in the following form, viz. To

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A. B. his heirs and assigns for ever, according to the custom of the said manor, or to A. B. his heirs and assigns according to the custom of the said manor, and that such surrender was made through the hands of two customary tenants; and, that when the homage or jury found the death of a customary tenant, and the descent of his tenement upon his heirs, they found in these terms; "that A. B. died seised to him and his heirs of a customary tenement, to which premises the said A. B. was admitted tenant at a court held at such a time; and that C. D. was his next heir according to the custom of the said manor." And, on such surrender being presented to the court the homage or jury or a part of them subscribed their names to a certificate under it, to the following effect: "We find this surrender to be duly taken according to the custom of the manor." From the rolls of the admittances it appeared, that the admissions, from the period where they began, viz. 1674, ran nearly in the following form, viz. After stating the surrender found on the death of the tenant and his heir; "to which said A. B. the lord, by his steward, hath granted seisin thereof to have and to hold the said customary tenement with the appurtenances to him and his heirs, at the will of the lord, according to the custom of the husbandry of the said manor, rendering therefore to the lord and his heirs, as well in grain as in money, as other tenants have heretofore rendered or ought, and have been accustomed to render, for the premises aforesaid, at the usual times, and performing all the services, duties, and customs heretofore therefore due, and of right accustomed, and gives to the lord for a fine —l. and has done his fealty, and is thereupon admitted tenant" Mr. *Grey* had not exercised any right on the land which he might not have been entitled to as a copyholder, and had not dug for coals; neither had the

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lord dug for them; but Mr. *Grey* when he built his house at *Backworth* dug the stones on the estate.

Upon this evidence, it was contended on the part of the *plaintiff*, that the grant to hold according to the custom of the husbandry of the said manor, was the same as a grant to hold according to the custom of the manor; and, that upon the authority of the case of *Gale* v. *Noble*,* which was as follows, "where lands time out of mind passed by surrender and copy of court-roll and the grant was always *tenend. secund. consuetudin. manerii*, and never had the words *ad* or *secundum voluntatem domini*, it was held not copyhold but customary freehold;" this land must be taken to be customary freehold for it was necessary and essential to a copyhold that it should be held at the will of the lord. And they contended that as, upon the authority of *Hussy* v. *Grill*,† a copyhold cannot be created at this day, no act of the lord or the tenant could change the tenure. There was great difficulty in settling the meaning of the words, "the custom of husbandry," and as no precise meaning could be given, the learned judge, said it would be fanciful to say, that the lord was to direct the husbandry, although it should be held at the will of the lord, according to the custom of husbandry; that, if he were to conjecture, it was probably a base service, and the service might be a mere service of husbandry, yet the decree of the court of exchequer, and the letters patent seem to indicate a military service also; but that was mere conjecture; yet as the modern entries upon the court-rolls were at the will of the lord, it should now be taken to be a base service, at the will of the lord, and might be construed a designation of a base service of villenage, and a copyhold tenure. Whereupon the jury found a verdict for the *defendant*.

* *Carthew*, 432. † *Amb.* 229, 301.

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In last *Michaelmas term*, a rule was obtained to shew cause why there should not be a new trial, and it was argued in *Easter term*, by PARK, TOPPING, and HOLROYD, for the *plaintiff*, and by COCKELL, Serjt. and WOOD for the *defendant*;

When the above case of *Gale* v. *Noble*, was again principally relied upon, and *Brittle* v. *Dade*,* was cited, where it was held that a statement in pleading that lands are held *ut de manerio*, is inconsistent with the lands being copyhold. It was also contended, for the *plaintiff*, that the minister's accounts were not evidence; that although the admissions were some of them at the will of the lord, yet none of the surrenders were in that form; that the lord could only admit according to the surrender *Roe* v. *Griffith*,† and, that the subsequent admittances at the will of the lord were usurpations by the lord as it appeared from the evidence, about the reign of King *Charles II.*; that the form of surrender set out is very different from that which ought to be the form if it were a copyhold; that the court cannot infer, that land is held at the will of the lord; that although the king in his letters patent, states it to be held at the will of the lord, yet that is no more than a recital in a deed between other parties, which does not bind the *plaintiff*; and that the evidence of digging for stones was evidence that the freehold was in the *plaintiff* and not in the lord.

And now the judgment of the court was delivered in effect as follows, by

Lord ELLENBOROUGH, C. J. After stating the case and the evidence on the part of the *defendant* as above. 'This *plaintiff* is the tenant of Mr. *Grey*; and the Duke of *Northumberland*, claims, as lord, on account of the tene-

* 1 *Sal.* 185. 1 *Lord Raym.* 43. † 4 *Burr.* 1052.

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ments being copyhold, held at the will of the lord, the coals under the tenements of his manor of *Tynemouth:* and he proves not only that the original grant is of the mines, from the crown, but that he himself by his steward has granted to a variety of persons from the year 1663, in terms, as held of the manor at the will of the lord. He produces also the minister's accounts of the 15th of *Eliz.* within thirteen years of the oldest entries on the other side, for they are only in point of antiquity thirteen years later, and contends that looking at the terms of the admission, the terms of the grant, and what is most material, the possession and enjoyment, the soil appears to be uniformly, from all time, in the persons claiming the right to the coals, on the part of the duke, and that the lands passed by surrender, and were copyhold, at the will of the lord. On the part of Mr. *Grey* it was contended, that, although they passed by surrender, yet they were not copyhold, the tenant not holding *at the will of the lord*, but only *according to the custom of the manor;* and much reliance was placed upon the case of *Gale* v. *Noble.** In that case it was laid down that where the admittance was *secundum consuetudinem manerii*, it was not copyhold. But it did not appear in that case, upon any of the rolls or copies there produced, that it was ever granted *ad voluntatem domini*, but only to hold *secundum consuetudinem manerii*. Without impeaching the authority of this case, and supposing that if it appeared so to be holden, upon all the rolls, then it would be a freehold; yet there not only exists here no such evidence but the contrary is the fact; for, here the admissions are uniformly for a long time, to hold *according to the custom of the manor at the will of the lord.* But it is contended that these instances of the admis-

* *Carthew*, 433.

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BOURN *versus* RAWLINS.

sions are of no avail, because they do not pursue the terms of the surrender, and it is contended from the 41st section of *Lord Coke's Copyholder*, that the lord is only an instrument and must pursue the surrender. It does indeed appear that the terms of the surrender point out the grant to be made, and that the grant cannot qualify the terms of the surrender. Lord *Coke* in the places cited, uses these words:* 'besides in admittances upon surrenders, the lord being accounted nothing but a necessary instrument, it followeth that he hath a bare customary power to admit, *secundum formam et effectum sursum reddendi;* therefore, if there be any variance between the admittance and the surrender, either in the person, in the estate, or in the tenure, or in any other collateral points, the lord doth only transfer an estate according to the surrender, and his authority, if it can take such effect. As if I surrender to the use of *J. S.* and the lord admits *J. N.* this admittance is wholly void; and notwithstanding this admittance, the lord may afterwards admit *J. S.* according to the effect of his authority.' And afterwards he says, if I surrender to the use of *J. S.* for life, and the lord admits him in fee, an estate for life only passeth. So if I surrender without mentioning any certain estate, because, by implication of the law, estate for life only passeth, though the lord admit in fee, no more doth pass than the implication of law will warrant. If I surrender with the reservation of a rent and the lord admits, not reserving any rent or reserving a less rent than I reserved upon the surrender, this admittance is wholly void, but if the lord reserveth a greater rent, then is the reservation void only for the surplusage, and the admittance so far current as it agreeth with my surrender. If I surrender upon condition,

* *Co. Copyholder*, s. 41, p. 92, 1764.

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and the lord omits the condition, the admittance is wholly void; but, if my surrender be absolute and the lord's admittance be conditional, the condition is void, but the admittance in all points else is good." The surrender therefore, so far as it points out what person the estate is granted to and for what interest, may govern; but it cannot be compulsory for the tenure, because the lord and tenant are bound, both, by the custom."

[His lordship then stated the evidence on the part of the *plaintiff* as above.] "Under the decree of the 8 *Jac. I.* the whole dispute was whether the lands were estates of inheritance and whether certain fines were payable; but on this occasion, it was never suggested, that they had the qualities of freehold tenure belonging to them. The court then made an order, that, seeing the court-rolls could not be found, they were to pursue the ancient form which was there certified; that the copyholders were copyholders of inheritance; that the ancient customs were such as the copyholders alledge them to be; that the ancient rights and customs of the said townships for the said estates of inheritance should be observed, and then this word "freehold," occurs; "every tenant who has some estate of freehold shall pay a fine, &c."* Now the word freehold and estate of inheritance coupled in this manner may have a limited signification. A man may have *quasi* a freehold in a copyhold; and this means therefore the quantity of interest, not the nature of the tenure. This decree is made in pursuance of an act of parliament, 7 *Jac. I.* c. 21. This act of parliament goes to the extreme limits of legislative authority, if not beyond it; for it confirms a decree thereafter to be made and gives a binding effect to all the decrees to be made, by the court of exchequer

* In the copy furnished me by the attorney for the *defendant* and his counsel as stated, above no such word occurs.

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for three years. [Here his lordship stated the act of parliament.] It does not appoint any restrictions; but the decree on which Mr. *Park* relies is out of the three years, and the court had no authority to make it under the act; The order is in *Easter Term*, in the 42th of *Jac. I.*; the act is in the 7th year of *Jac. I.* more than three years before. By this order, it appears that the Earl of *Northumberland* certified under his hand the forms of the copies, and the order is, that the copies shall be entered in the form thereinafter, which runs thus: "to whom our lord the king, by his steward hath granted to him thereof seisin, to hold to him and his heirs according to the custom of husbandry aforesaid, doing and rendering therefore the rents and services and customs therefore heretofore due and accustomed." And it is contended, inasmuch as the decree, supposing it to be operative, shews that it was formerly held according to the custom of the manor, and, seeing, that custom of husbandry, is the same as custom of the manor, then this must be freehold. This argument assumes that "custom of husbandry" necessarily means according to the custom of the manor and no more. I rather think the meaning must be collected from the usage which has obtained, and if the usage is, that the lord had not the right to the soil, the custom might be to hold as the lords' husbandry; but it probably imports a villenage tenure very different from the custom of the manor. [His lordship then stated the rest of the evidence.] This is all the evidence, and on this, it seems as if the only question raised on the part of the *plaintiff*, is with reference to *Gale* v. *Noble*, that the case of *Gale* v. *Noble*, having laid down, that where the copies are universally with admission to hold according to the custom of the manor only, and not at the will of the lord, they are to be intended to be freehold. In that case it is stated that there was no evidence on the rolls to the *contrary*.

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What the evidence was is not stated. But here in many instances there are admissions to hold at the will of the lord; and the argument begs for its foundation, that 'according to the custom of husbandry' and 'according to the custom of the manor,' mean the same thing. But in the ministers' accounts it is stated, that they were held by the custom of husbandry, at the will of the lord, and if this only goes upon an even balance, we are to consider that there never was a question raised, amongst any of those questions which were litigated by the suits in the exchequer, whether the lord was owner of the soil, but only what were the quantity of the estates, the rents, and the fines. It is also in evidence that the lord got coals from other parts of the manor, and when the tenant got the coals he took them in his freehold, when he might have got them under his copyhold, if he was at liberty to do so; and as to the remark that has been made, in order to get rid of the effect of that circumstance, namely, that it was too near his mansion house to render it convenient to dig for coals there, seeing what magnificent dwellings there are in the north adjoining to the coal mines and how much to their interest it is, it is hardly to be supposed that such a consideration would induce him to forego so manifest an advantage."

RULE DISCHARGED.

FREELAND and Another, Assignees of TIPPING *against* GLOVER.—8th *June.*

It is sufficient if the assured in making the insurance communicate fairly the present state of the ship, and lay open such circumstances pro et contra, *as may lead the insurer to make further enquiries concerning the prior state of the ship; so, where on a policy from twenty-four hours after the arrival of an* African *trader at her first place of trade*

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on the coast of Africa, *&c. a letter was communicated stating the arrival in* March *at* Gabon *river, that they had got part of their red wood and expected to get all, in the next month, and would sail in* May; *that they had now got nine men, but provisions were low, that they were so weakly handed that the natives did as they pleased, and referred to a prior letter which was not communicated; but in which had been previously stated the loss of several men by an insurrection of the natives and by disease, reducing the crew to five, and the loss of running rigging and other necessaries; held, that this last letter was a sufficient communication, it being a true account at the time, and referring to past transactions and to a prior letter, concerning which the underwriter might have enquired. The premium was very high.*

FREELAND and Another *versus* GLOVER.

UPON an action on a policy of insurance on goods in the ship *Neptune, Skelton,* master, at and from twenty-four hours after her first arrival at her first place of trade on the coast of *Africa*, and at and from thence to *Liverpool,* during her stay and trade on the said coast of *Africa* and *African* islands, at a premium of 26l. 5s. per cent, the following case was proved. The ship sailed 9th of *June,* 1799, with 12 guns and 20 men from *Liverpool*; one *Fisher* being master, and arrived without accident at *Gaboon,* 7th of *August,* 1799, and traded on the coast, remained there about ten days, and went to the *Cameroons*, where they arrived the 29th of *August,* 1799. They staid about eight weeks trading there, and the crew were then very sickly. Thence they sailed to *Old Calabar,* where they remained about five weeks, and took on board seven puncheons of palm oil, and two puncheons of pepper, and buried two of their crew, the rest being very sickly. About the latter end of *November,* or beginning of *December,* 1799, they sailed from *Old Calabar* bound to *Gaboon,* to take on board their wood, and one more of the crew died. On the 19th of *December,* in standing along shore off the river *Danger,* some black people in canoes came to the ship to make trade, and

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on their getting on board, they attacked the crew and killed the captain and steward, and one landsman, and severely wounded the remainder; and they had after, plundered the vessel of every thing they could find and cut away the running rigging, the crew, after a severe conflict, drove the black people overboard and got possession of their vessel again. They then proceeded to *Bembea*, where they arrived in a very deplorable condition, being all sick and wounded. After remaining about seven or eight weeks there, repairing their rigging, refitting the ship, and getting themselves refreshed, they sailed for *Gaboon*, and arrived on or about the 24th day of *March*, 1800, having then only nine people on board. They continued at *Gaboon* three months, and there took on board 16149 billets of red wood, being all that the natives would suffer them to take, but the natives took and kept by force from the *Neptune* her two boats. They sailed to the island of St. *Thomas*, and there procured a boat. On the 16th of *June* they sailed from thence and proceeded on their voyage bound to *Liverpool*; but the vessel being very foul bottomed they could beat very little to windward, and they met with very bad weather. On the 3rd of *July*, they had a heavy gale of wind in squalls, and they thereby lost a number of their sails, some of their rigging gave way by stress of weather, and they were driven to leeward. The vessel was very leaky, and on the 1st of *August* they made *Prince's* Island, but they could not fetch the harbour, until about six or seven weeks afterwards, the crew being all very sickly, and the then captain, *George Skelton*, confined to his bed and not expected to live. Not being able at *Prince's* Island to get the ship repaired she was condemned and the ship and cargo sold; but the owners had received none of the produce. When the ship sailed from *Liverpool*, she was well victualled and stored with spare rigging and pro-

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visions; but after the ship left *Bembea* she had nothing to spare. When the insurance was effected the agent produced to the underwriters the following letter of the 21st of *April*, 1800, but did not produce the letter of the previous date of *February*, 1800, to which it refers. It was objected at the trial that the assured should have communicated both the letters; but Lord ELLENBOROUGH, C. J. before whom the cause was tried, held that it was sufficient to communicate only the second. The premium was very high, and one of the special jury expressed great surprise that any insurance was obtained. The ship traded only in produce and not in negroes. There was a verdict for the *plaintiffs*, and afterwards a rule was obtained to shew cause why there should not be a new trial, upon the ground of fraud in not communicating the letter of the date of the 15th of *February*, 1800. The letters were, as follows:—From *Skelton*, the master, to his owner:

Bembea, Feb. 15, 1806.

"I am sorry to inform you of the melancholy circumstance that happened on board the snow *Neptune* off *Cape St. John's* close to the river *Danger*. Captain *Fisher* finding all the ship's crew in a very bad fever, thought it proper to stand in shore and get some store for the sick. Three canoes came off and spoke very good *English*; we bought six fowls from them; but the blacks began to be very impudent, the captain told the boatswain to give them a cutlass, which he did; but the blacks soon took it from him, and killed him dead on the spot, and stabbed him in twenty places. They killed the steward and one of the landsmen. The rest of the people were all very much wounded. There were a good many of the blacks killed on the deck, by the boatswain and two of our men. All the rest were in a very dangerous fever. The second mate Mr. *Cone* died, four days afterwards, in a fever and his wounds together. At this time only six hands left alive. Our condition is to be pitied; we were fourteen days at sea before we reached *Bembea*, where the *Neptune* lies.

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I have buried the boatswain since my arrival here. I am sorry to inform you that there are only five left alive in the ship, and I cannot get one man here, nor in *Calabar*, nor in the *Camaroons*, and what to do I do not know. We are all very sickly on board; we have on board about six tons of ivory, six puncheons of palm oil, two puncheons of pepper, two casks of bees wax. That is what I have on board at present till I get to *Gibon* where our wood is. I am sorry to inform you that *Qua Been's* son was on board at the time they had possession of the ship. They plundered the ship of all our clothes and several other things which I cannot mention. We are all in a sickly state on board and our cabin stores are all done; but that I do not mind, if I only had men to get the ship to *Gibon* to get our wood.

GEORGE SKELTON.

Gibon river, *April* 21st, 1800.

"We arrived in *Gibon* river on the twenty-fourth of March, and have only got on board one third of our red wood, and the most part by our long boat. The natives on shore, finding us weakly handed, and our goods taken from us, they do as they please. I have nine men on board now; but our provisions run very low. You may think the trouble and fatigue I have with the natives on shore, and I do not expect to get all my wood, till the latter end of next month; when you may expect me sailing. The wood in general is all very small billet, the ivory, palm oil, bees wax, and pepper, I made mention of in my last letter. I got 5000 billets of choice wood from *Prince William* side, every billet as big as four of the billets at *Batavia* side. It is a great hurt to me staying so long here; but you may depend I do my endeavour to get the wood off, for I go myself in the long boat. I made the mate, and that is all I have to depend on, and he has no navigation. Captain *Eccles* the ship *Amerall* arrived yesterday from *Camaroons;* you must excuse this letter, I was in a very great hurry when I wrote it, for the *Rody* brig was under weigh when I wrote it, I have no more to say at present.

Sir VICARY GIBBS and LITTLEDALE now shewed cause.

PARK for the *defendants*, in support of the rule, con-

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tended, that, according to the rule laid down in *Heywood* v. *Rogers*, namely, that there should be a true representation of every thing relating to the risk, except what is covered by the warranty, the first letter ought to have been communicated. For by the second letter it would not appear, that the ship had been so great a length of time upon the coast of *Africa*, as she really had been, nor did it intimate the death of the persons by sickness, or that new hands had been gotten to work the ship, or that there had been an insurrection of the negroes, or a loss of the running rigging. That the policy attached upon the first arrival, and therefore the warranty of sea worthiness, whether applying to the health and sufficiency of the men, the staunchness of the ship, or the sufficiency of the rigging, did not apply up to the time of the making the insurance.

Lord ELLENBOROUGH, C. J. "'I have *nine men now; but* our *provisions* are very much diminished,' that shews that he thought it an advantage; that he was in a better state than before; but, as a drawback upon that, he adds, that his provisions run short. In a case of this sort, it is sufficient if there be a communication of all that relates to the present situation of the ship, and sufficient to lead to other enquiries as to what may be doubtful. For we are to take into our consideration, that the person who underwrites is acquainted with the nature of the voyage and the course of the trade. The insurance is from twenty-four hours after her arrival, and the trade is principally a coasting trade: for they carry out articles, which they batter from one place to another, for slaves or for gold dust. 'We arrived in *Gibuon* river the 24th of *March*.' This might be the place of their first arrival or not, but he meditates his return, and says, that he had been getting bees wax somewhere else, and that he was here to get wood for his return home. He was not to go to the

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West Indies, and he shews, that he had written another letter before. The underwriter therefore, knew that this was a second letter, and consistently with this there might be a great many letters. He states what his condition is at the time: he says 'the natives do as they please with us,' 'we are so weakly handed;' that is, so few in number. The jury felt that it required a good long premium to get it underwritten at all. If the underwriter wished for more information, he should have asked for the other letter. In *Heywood* v. *Rogers* it was held that, if upon any question asked, there had been a concealment, that fact would have been decisive against the claim for the insurance; but, if he communicates all that is true as to her immediate situation, that is sufficient, and here is enough to create a motive for further enquiry. It is sufficient if he communicates what is true at the time and enough to lead to further inquiry. 'Nine men now.' The average crew might be eighteen men; but what matter was it whether they died by the sabre or by disease? That is immaterial. But it is enough that the *plaintiff* communicated what was true, and laid a ground for other communications which the *defendant* might have had, if he had asked for them. It could never be understood, that this was the first arrival, for the ships stay sometimes two years on the *African* coast, and are like factory ships. There is no ground to say here, that there was a suppression of any material fact.

GROSE, J. Of the same opinion.

LAWRENCE, J. "On first looking at this letter, I thought that it purported only to state the time of the first arrival of the ship on the coast of *Africa*; but, now, I think it is impossible, that it could be so understood. If true at the time, and it pointed out circumstances material to be enquired into, and the party did not do it, they cannot now be set up as a defence. [Here he

rdship read the letter,] Could it be understood that rovision ran low, unless they had been a long time on ie coast? The men might have been reduced sudden- but not the provisions.—'I do not expect to get ll my wood till the latter end of the next month; ben you may expect my sailing.'—Did one ever hear f an *African* voyage to continue on the coast only wo months, from *March* till *May*?—'The ivory, alm oil, bees wax, and pepper, I made mention of in ay last letter.'—If the former letter had stated that e was at *Gaboon*; this would not have stated that e arrived on such a day; which plainly shews that he ad been somewhere else. The underwriter was upon he ship from the 24th of *March* only, but must have nderstood that she had been long upon the coast, and f this did not contain all the information he wished o have, he ought to have inquired."

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LE BLANC, J. of the same opinion, and was after stating similar grounds for that opinion, concluded by saying, that there were many circumstances communicated by the letter to call upon them to inquire, if they did not take it as a desperate risk upon a long premium.

RULE ABSOLUTE.

BROOK *against* BENNETT.—*June* 16.

Although common process may be served on the last day of the return, and although the declaration may be filed de bene esse *on the same day, and notice served, yet if the process*

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BROOK versus BENNETT.

*be served at the same moment of time it is bad, for it excludes the possibility of the declaration being well filed at the time of the service of notice since the declaration cannot be filed in point of law till after.**

THE *plaintiff*'s attorney served a notice of declaration filed *de bene esse*, on the 3d day of *May*, and at the same time served the process. It was the last day of the return of the process, and, finding that the party was not at home, the clerk waited as long as he could, and at last found an opportunity of serving both together.

On a rule to shew cause why the proceedings should not be set aside for irregularity. It was admitted that the process might be served on the last day of the return, and the declaration be filed and notice be given on the same day, but that here, as the process was served at the same time with the notice, and the declaration could not be filed *de bene esse*, until after the process issued, the notice of declaration must have been served before the declaration could have been filed.

And by the COURT. "If there had been the least interval we would have intended that the process had been served first. We will do any thing but presume an impossibility, and here it is impossible that the declaration could have been filed when the notice was served."

RULE ABSOLUTE.

* But service of a *latitat* at 8 o'clock in the evening of that day on which it is returnable is good, though the declaration be left in the office in the course of the same day. 1 T. Rep. 191.

1806.

JONES *against* BURTON.—6th *June.*

Where a sheriff's officer was written to by the plaintiff's *attorney to execute the process and receive the debt and costs, and he did so, and paid the debt to him, but there was a dispute, between him and the* plaintiff's *attorney, as to the costs; held, the* plaintiff's *attorney could not proceed upon the bail bond for the costs; the debt and costs being paid to his agent.*

Agent. Arrest. Bailiff.

ON a rule to shew cause why the proceedings on the bail bond should not be set aside, the following facts appeared:

JONES *versus* BURTON.

On the 23d of *January, Burton* was arrested by one *Broom* a sheriff's officer at the suit of the *plaintiff*, and paid him 5l. 15s. 6d. for the costs, with an undertaking to pay the debt; and on the 3d of *February* the debt, amounting to 388l. 7s. 8d., was paid before the return of the writ. The *plaintiff* had since taken an assignment of the bail bond and was proceeding upon it against the *defendant*. *Broom* the sheriff's officer said, that he received the warrant from *Martin*, an attorney at *Hull*, to arrest *Burton* for the above sum, that he did arrest him, and he paid the debt and 5l. and upwards for the costs, that he received a letter from *Martin* with the writ authorising him to receive the debt and costs, but he did not state what costs nor did he in his affidavit set out a copy of the letter; he added that he paid *Martin* the debt with the costs, but did not say what costs, before the return of the writ: *Martin*, the attorney, on the contrary stated that about the 28th or 29th of *January, Broom* called upon him to settle with him for other arrests, and informed him that he had arrested *Burton*, and that Colonel *Thornton* and another gentleman were his bail, but did not then say any thing about the costs. Afterwards however, he said he had received 5l. 15s. 6d. for costs, and that his costs were five guineas, and there-

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TOMKINS verms WHITE.

chaser of one of several lots of an estate described in the conditions of sale as follows, viz. lot 25 "a leasehold estate situate in *Angel court*, *Princes street*, *Westminster*, comprising 11 houses, numbered 2, 3, 4. 5, 21, 22, 23, 24, 25, 262. Two houses No. 2, and No. 5, are let on lease, No. 22, and 23 are let in tenements, and the remaining houses are let to tenants at will at rents amounting in the whole to about 177l. The estate is held under the *Dean* and *Chapter* of *Westminster*, for an unexpired term of 10 years at *Lady day* 1805. It may be renewed to the original term of 40 years according to the custom of the said *Dean* and *Chapter*.

	£.	s.	d.	
Subject to a ground rent of	3	0	0	
Acquittance	0	1	4	
				£. 3 1 4
Water rent	6	0	0	
Land tax	9	11	3	
				15 11 3
				£. 18 18 7

And the following was among the conditions of sale, viz. article 4. That, upon payment of the remainder of the purchase money, on or before the time above limited, the purchasers shall have proper conveyances and assignments of the respective lots, at the expense of the purchasers The original lease, under the *Dean* and *Chapter* of *Westminster*, being produced, it appeared to contain a demise of 9 houses comprehending the whole of the above lot. But a part of the house No. 2, being about 12 feet by 8 of the ground belonging to it, had been, previous to that lease, given up by *Cheare* the former possessor to a person of the name of *Gilbert*. The original lease from the *Dean* and *Chapter*, however, still contained the same description of the premises, and it was admitted that this small

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TOMKINS *versus* WHITE.

plot of ground which was not contained in the particulars, was comprised in the lease, and that being a repairing lease, if the *plaintiff* took an assignment he would be bound by the covenant to repair, as far as concerned that same plot of ground, but it was said on the part of the *defendant* that the surrender of it was with the knowledge of the *Dean* and *Chapter*, and that they would not call upon the *defendant* or his assignee to comply with the covenants as to so much. The *plaintiff*, upon applying at the *Dean* and *Chapter's* office to see the *plaintiff's* counterpart of the lease and the plans, refused to complete his purchase, and the *defendant's* attorney threatened to compel him, notwithstanding, to take an assignment absolutely. The *plaintiff*, as the conveyances were to be at his expence, tendered an assignment and required an indemnity against the *Dean* and *Chapter* or a new lease from the *Dean* and *Chapter* of *Westminster*, for the time; which being refused, the *plaintiff* brought his action for not completing the purchase and for the deposit money. At the trial the facts of the *plaintiff's* case were clearly proved, and that about 17 feet by 10 had been given up by *Gilbert*. The counsel for the *defendant* offered to prove by Mr. *Horsefall* the clerk to the *Dean* and *Chapter* of *Westminster*, that the giving up of this plot of ground was with their knowledge, and that the *plaintiff* would not be called upon to deliver it up at the expiration of the lease.*

* It appears by my note to have been stated upon the motion that they offered to prove by *Horsefall*, that the *defendant* offered to procure a new lease from the *Dean* and *Chapter* of *Westminster*, or to give an under lease wanting one day of the term; and that this offer was made before the trial. As well as I recollect, at the trial, having taken no note of it, it was stated that *Horsefall* would prove that the *Dean* and

1802.

TENDING CURSE WAIVE.

Lord ELLENBOROUGH, C. J. Holding that the *plaintiff* was entitled to have a good conveyance of all comprised in the lease, rejected this evidence and stopped the counsel for the *defendant* in his address to the jury, and a verdict was given for the *plaintiff*.

JERVIS for the *defendant*, in *Easter* term, obtained a rule to shew cause why there should not be a new trial, on the ground of the rejection of this evidence, and stated that by means of this surrender of the small plot the original rent was reduced, and that whereas the particulars stated the net produce of the estate to be 170l. the *plaintiff* would have got more than 170l. per annum; but this point was afterwards but little noticed or relied upon, and it did not appear to have been particularly urged at the trial; and upon examining the particulars, it appeared that the rental was stated to be about 170l.

GARROW and GURNEY, now shewed cause, and insisted that the *plaintiff* was bound to complete the purchase according to the particulars, which referred to the lease from the *Dean* and *Chapter*, and that the *plaintiff* ought to have a good and valid assignment and conveyance of all that was contained in that lease, and that he could not have it, he was entitled to refuse a conveyance short of that, and to bring this action.

JERVIS and WIGLEY, *contrà*, shortly endeavoured to shew from the particulars that the *defendant* did not sell by the lease of the *Dean* and *Chapter* of *Westminster*, for it would be true, as stated, that the premises were held under lease from them, although the

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Chapter were willing to grant a new lease, omitting this plot of ground; but that this was after the action brought: and the *plaintiff*'s counsel offering to accept it then, there was a difference as to the costs.

lease comprised 9 houses, and the *plaintiff* sold one only. 1806.

TOMKINS versus WEBB.

Lord ELLENBOROUGH, C. J. "One short fact disposes of this case. You did not give the sort of conveyance which you ought to have given, of the part in your possession, which the deduction of your title would have enabled you to do. A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected of them. The particulars are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates. If these particulars are read, there being no exception, I suppose, that the whole are held of the *Dean* and *Chapter*, and are to be conveyed to me as such; and there is nothing in them to make the lease any thing less than a full exhibit of what is to be conveyed to me. Even if I should go to the houses to see them; there is nothing to lead me to inquire into the fact, whether a part of the angle of 4 feet 10 or 17 feet is subtracted from the original ground plot. It appears, indeed, that there had been a separation of part, prior to the lease; but still I should be liable under the covenants. And, although, perhaps I might have relief in equity against those covenants, if the lessors are cognisant of it, yet I am not to be satisfied with that in a court of law; and the vendor is not to give me a lease of one thing and to make me pay at the auction price for another."

GROSE, J. "It is plain that these houses were intended to be sold as they were leased by the *Dean* and *Chap-*

1806.

TOMKINS *versus* WHITE.

ter; if not, why did they not state that No. 2 was not sold as leased by them."

LAWRENCE, J. "Considering the great sums of money which auctioneers are paid for preparing particulars and selling estates, they ought to be more correct. They contended some time ago, that they were entitled to have the full sum of 5l. per cent. commission; even if a man advertised an estate to be sold by auction, and it was afterwards sold by private contract: and now they contend for half the full commission. If they have such high charges, they should give the public full information of what they are to sell. On reading these particulars, if I had gone to see what *Radford* the tenant of No. 2, occupied, I should have thought that it was the whole that he held of the *Dean* and *Chapter*. The particulars ought to be the same as if the lease, under-lease and all were under the inspection of the purchaser; but, here not even an ocular inspection of the premises could ascertain this fact, without admeasurement and comparison with the plan, and it is not very much the custom to examine deeds at auctions, nor till after, when the abstract is delivered. The *defendant* in this case, after the objection is made, writes a letter by his attorney that there is a want of common sense in it; but instead of talking in that high stile, he should have enquired what would have satisfied the *plaintiff*, and given him the best conveyance in his power."

LE BLANC, J. "There has been a great deal of obstinacy in the *defendant*. Taking all to be correctly stated by him and that the *plaintiff* bought only the houses as they now stand; yet he was bound to state in the abstract, that there was such a mistake in the plan in the margin of the lease, and that it would be rectified either by a new lease from the *Dean* and *Chapter* or by an under lease of the other part. If the

plaintiff had taken the assignment of the lease he would have a law suit, at the end of the term, with the *Dean* and *Chapter*, whether they would give him a lease on any other terms than with the description in the margin of the former lease."

1806.

TOMKINS *versus* WHITE.

RULE DISCHARGED.

STAREY *against* BARNES.—7th *June*.

A. draws a bill of exchange on B. and indorses to C. who indorses to D. for a good consideration; B. accepts but does not pay; after the bill is due, A. becomes bankrupt; Held that this is within the words of the statute 7 Geo. I. c. 31, *and may be proved under A.'s commission.*

Bankrupt. Stat. 7 Geo. I. c. 31, Bill of exchange. Drawer and indorser. Debitum in presenti.

Q. *Whether it be* debitum in presenti solvendum in futuro.

Semble, *it is a credit given for the security of a bill of exchange to one who becomes bankrupt, and therefore within the express words of the statute.*

THIS was an action by the indorsee against the drawer, upon a bill of exchange drawn by the *defendant* on one *Gardener*, at two months dated accepted by *Gardener* payable to the *defendant* or order, and indorsed by him to one *Warwick*, who was agent to *Barnes* and indorsed by *Warwick* to the *plaintiff*. The *defendant* became bankrupt on the 21st of *November*, and a commission of bankruptcy was taken out against him dated the 4th of *November*. There had been another bill by *Warwick* which was dishonoured on the 18th of the same *November*, and the giving up of that bill was the consideration to *Warwick* for the bill in question. At the trial *Gardener* proved the bill, and that it was given in exchange by *Warwick* for a bill accepted by *Starey* and drawn by *Warwick*. Plea of bankruptcy.

STAREY *versus* BARNES.

At the trial before Lord ELLENBOROUGH, in the

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STAREY *versus* HARRIS.

sittings after *Michaelmas term*, 1805, his lordship ruled that the bill, not being dishonoured till after the bankruptcy, it could not be proved under the commission against the *defendant*, this not being *debitum* in *presenti*, and a verdict was taken for the *plaintiff*.

In *Hilary term*, 1806, MARRYAT for the *plaintiff*, obtained a rule to shew cause, why there should not be a new trial, upon the ground, that this was proveable under the commission, and cited *M'Cartey* v. *Barrow*,* *Ex parte Adney*,† *Rucker* v. *Francis*.‡

PARK and WIGLEY now shewed cause. "The cases in the books maintain the distinction taken at *nisi prius*, that there is a difference, in the case of bankruptcy, between a bill accepted at the time of the bankruptcy and one which is not accepted; in *M'Cartey* v. *Barrow*,‖ it is evident that the cause was determined upon the non-acceptance, and in *Cowley* v. *Dunlop*,§ where that case is cited the question turned upon the counter securities. And so in *Milford* v. *Mayor*;¶ see also *Balingshall* and Another v. *Gloster* ** Almost all the cases in the books, of proving under commissions of bankrupt *debita in præsenti solvenda in futuro*, are cases where the bankrupt is liable at all events; but here *Barnes* was only a collateral security and could only be liable to pay upon the contingency of the failure of the drawer. There are no other circumstances to shew, that the *plaintiff* could have proved under the commission upon any other ground than merely that of the bill."

Lord ELLENBOROUGH, C. J. "In *M'Cartey* v. *Barrow*, they say that the drawing is the thing."

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* 3 *Wils.* 16. † *Cowp.* 460. ‡ *Ambl* 672. ‖ *Str.* 949. 3 *Wilson*, 16. § 7 *Term. Rep.* 575. ¶ *Dougl.* 54, 55. ** 1 *Law Journal, by Morgan and W.*

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STAREY versus BARNES.

PARK. "That expression is used only in answer to an argument put by the counsel, but the court proceeded upon the particular circumstance of the refusal to accept."

Sir VICARY GIBBS, *contrà*. "The *plaintiff Starey* was a *bonâ fide* holder of the bill, and the *defendant*, upon the non-payment by the acceptor, became liable to the *plaintiff* with a retrospect, as to the period of becoming indebted, to the time of the drawing of the bill. In *M'Cartey* v. *Barrow*, as reported in *Wilson*, it is clear that the drawer became a bankrupt between the drawing of the bill and the return of it, and that case is therefore directly in point. In *ex parte Harrison** it was attempted to carry the doctrine further, and to apply the principle to a collateral undertaking to pay; but Lord *Thurlow* said, that, in order to enable the party to prove under the statute 7 *Geo. I.* c. 31, he should be an indorser. That case appears to have been upon an accepted bail, and Lord *Thurlow* admitted the principle, and would have applied it in that case if *Lewis* had been indorser. He nevertheless contended that whether the return of the bill was upon the non-acceptance or non-payment was immaterial. They cited also *Ex parte Adney*."†

Lord ELLENBOROUGH, C. J. "It occurred to me, at the trial, that this was an undertaking to pay in case of the *default* of the acceptor, and not a *debitum in presenti solvendum in futuro*. The drawing does not give an immediate debt to the indorsee, but it is a promise to pay on the omission of the acceptor. It first gives you credit on a particular person, and, if he accepts it, you may go against him. In the original formation of the bill there may be a liability in the drawer to pay; but it is conditional and contingent only,

* 2 *Bro. Cha. Ca.* 614. † *Cowper*, 460.

1808.

STARET versus BARNES.

and I own that my mind is not relieved from that difficulty. But I feel great respect for, and bow to the authority of the judges who decided the cases that have been cited. However, there is one plain guide in the express words of the statute, which I feel it best to go by. The words of the statute are, 'whereas merchants, and traders in goods, often sell on credit, and take bills, bonds, and notes payable at a future day, all persons who have given or shall give credit on such securities to any who becomes bankrupt on a good and valuable consideration *bonâ fide*, &c. shall be admitted to to prove their debts.' Here the credit was given on such security; for there was an exchange of bills given; 'given to a person who shall become bankrupt;' *Barnes* is become bankrupt; 'upon good and valuable consideration;' according to *Cowley* v. *Dunlop*, it is a good and valuable consideration, the exchange of one bill for another; '*bonâ fide*;' here is nothing to impeach it; there is therefore nothing to take the case out of the plain letter of the statute. I would not impeach the authority of a case which is so highly respectable, and which has been so much recognized in *Francis* v. *Rucker*, by Lord *Camden*, but by no means admitting that this is a *debitum in presenti*. I think it is within the statute, and that there ought to have been a verdict for the *defendant*."

GROSE, J. "I should have hesitated very much before I overturned *M'Carley* v. *Barrow*, which was recognized in *Francis* v. *Rucker*.†

LAWRENCE, J. and LE BLANC, J. assented.

RULE ABSOLUTE.

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† *Ambler*, 672.

SUTTON *against* WEELEY.—8th *June.* 1806.

A brick-maker in a large way making bricks for sale became by devise tenant for life of the land on which the kiln was worked, and of the earth and soil whereof the bricks were made; held, that by such manufacture on his own land he was not a trader within the statutes of bankruptcy.

Bankrupt. Trading. Stat. 13 Eliz. c. 7. s. 1.

SUTTON *ver sus* WEELEY.

THIS was a feigned issue directed by the Lord Chancellor on a petition in the matter of the *defendant*'s bankruptcy, to try the question whether the *defendant* had been a trader within the bankrupt laws, at any time between the 26th day of *September*, 1796, and the 1st day of *January*, 1803, the *plaintiff* in such issue asserting the affirmative. The cause came on to be tried at the last assizes for *Essex*, before Mr. Justice *Heath*, when a verdict was found for the *plaintiff*, damages 1s. costs 40s. subject to the opinion of the court on the following case: The *defendant* in the year 1795, his name being then *John March*, and then residing at *Wooleigh* in *Essex*, opened and entered with the excise officer of the district in which he resided, a public kiln as a brick maker in his then name of *John March*. When he so opened the kiln, he had no interest in the estate from which the brick earth was dug, the same being the property of one *Samuel Weeley*. And the *defendant* there carried on the brickmaking business until the decease of the said *Samuel Weeley* which happened on the 17th of *September*, 1796; immediately after the death of the said *Samuel Weeley*, the said *defendant* entered into possession of the estate, on a part of which the said brick-kiln was erected, and from which the brick earth had been procured, as devisee thereof for the term of his own life, for his own use and benefit, under the

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will of the said *Samuel Weeley*, subject to incumbrances; and the *defendant* continued in such possession, as such tenant for life, until the time of the issuing of the commission of bankruptcy against him, which was on or about the 16th of *January*, 1804. The annual value of the estate and manor was at the death of the said *Samuel Weeley* about 70l. per annum, the greatest part of which then was and ever since has been underlet to tenants, and the whole is subject to incumbrances to the amount of 230l. per annum, and consists of about 900 acres. Immediately after the death of the said *Samuel Weeley* the said *defendant* re-entered the same kiln at the said excise office in the name of *John Weeley*, (having taken that name in pursuance of the said *Samuel Weeley*'s will.) His said kiln was surveyed about every fourteen days by the surveying officer of the district from its first entry in 1795, until the latter end of the month of *July* in the year 1799. The same was a large and capital kiln and capable of burning 30,000 bricks at a time, and during all the above period was kept by the *defendant* for the general sale of bricks and tiles to any purchaser, and bricks and tiles were sold there to any persons who came to buy them, and that in great quantities, with a view to profit; the *defendant* usually employing seven or eight workmen at his kiln, who made the bricks at a certain price per thousand. During the above period, the *defendant* yearly, made about 150 or 200,000 bricks and a great number of tiles; part of which were, during that period, used by him in repairs on the said estate and in building a cottage on the brick ground for the foreman to live in, and a piggery and other buildings on the said estate; but the greater proportion thereof were sold to customers in general, and during that period the *defendant* at various times solicited custom from several persons, to purchase bricks and tiles from him at the said kiln, and he

exchanged bricks and tiles with one person for coals. On the 30th of *January*, 1796, the *defendant* caused an advertisement to be inserted in the *Ipswich* Journal, addressed to tile makers, for a tilemaker, and stated therein that a good hand might have constant employ in an extensive view of capital earth; and in the *July* following the *defendant* caused another advertisement to be inserted in the *Ipswich* Journal, addressed to brick and tile makers, for a person who was a complete master of the business of making chimney pots, glazing tiles, &c. to undertake the management of a brick kiln where there was an extensive view of excellent brick and tile earth for red ware only. In consequence of such advertisement he procured one *John Cook* as a foreman, to whom he represented at the time of engaging him, that he should burn from 5 to 600,000 bricks a year for sale. *Cook* from the beginning of that year, superintended the brick-making business until the month of *July*, 1799, when the *defendant* entirely gave up brick-making, from which time *Cook* jointly with one *George March*, (the *defendant*'s brother) hired the brick-kiln and premises of the *defendant* and carried on the brick-making business therein, on their own account, for some time after which the *defendant* let the premises to *Jeremiah Marjoram*, who continued to carry on and now carries on the brickmaking business therein; the *defendant* from the first opening of the brick kiln in 1795 and from thence until the decease of the said *Samuel Weeley* and afterwards, until he left off brickmaking in *July* 1799, carried on without interruption the manufacturing and selling bricks and tiles at the said kiln, in the same manner and with the same view to profit. The coals and some of the wood used in burning the bricks were bought of two or three different persons; but some of the wood and all the brick-earth, straw and sand used in the said brickmaking were procured and raised as aforesaid by the said

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John Weeley from different parts of the said estate and not bought. The brick-earth, straw, wood, and sand, procured and raised from the said estate, so first belonging to the said *Samuel Weeley*, and afterwards to the *defendant* himself for his life, subject as aforesaid, during the above period, and used in making the bricks and tiles from the time when the *defendant* first commenced the brickmaking business until he declined it; upon an average, formed less than a fifth part of the expense of the coals and wood purchased for the manufacturing such bricks and tiles, and the labour employed in rendering them saleable at the kiln, including the excise duty to be paid upon the same. If the *defendant* was a trader between those days, then the verdict to stand, if not then a nonsuit to be entered.

POOLEY for the *plaintiff*. "The first question will be whether this person was carrying on a trade, and next whether it was a trade which would make him liable to the bankrupt laws. The statute 1 *Jac. I.* c. 15, s. 2, is that all and every person using and that shall use the trade of merchandize by way of bargaining, exchange, bartry, chevisance, or otherwise, in gross or by retail, or seeking his, her or their trade of "living by buying and selling, &c." Here are therefore two branches, first that of "using the trade of merchandize," and next by "buying and selling." Therefore if a man were to buy the materials from the real estate, and to manufacture them, he might be within the statute, and now by the statute 34 *Geo. III.* c. 15, s. 4, a duty is imposed upon all bricks and tiles made in *Great Britain*, and by the 15th section the duty shall be made a draw back upon bricks sold as merchandize, under certain regulations, so that the legislature has considered them the subject of merchandize."

Lord ELLENBOROUGH, C. J. "There is, now a

duty upon slates; but the circumstance of a duty being imposed, does not give them any merchantable quality, distinct from the produce of the land, which they had not before."

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POOLEY. "A person who is owner of a plantation in *Jamaica*, manufacturing cotton in *Manchester*, and holding himself out as a trader, would be within the bankrupt laws; so a brewer of porter, a distiller, an iron-founder, and a manufacturer of copper. Suppose an iron-founder has a very considerable quantity of iron from off his own estate, which is manufactured by him, he is a person using trade and merchandize. In *Fort* v. *Turner*,* it was held that one who buys a coal-mine, works it, and sells the coals, is not a trader within these statutes; but the ground of that decision was, that he merely brings the produce to market as a farmer does, he sells the coal in its natural state; and although it was observed by the Lord Chief Justice, that the buying and selling, which is within those statutes, is to be confined to persons who live by a credit gained on an uncertain capital stock, yet it is also said that the case of the brickmaker is very different, the earth is manufactured and turned into quite another thing, but coals carried to market are the same as they were found in the earth. And Lord *Mansfield* said, in the case of *Parker* v. *Wells*,† that brickmaking for sale, abstractedly considered, is in fact carrying on a trade, and seeking to live by the profits. Many things are necessary to be bought which can only be paid by the money to arise by the sale of the bricks. The credit is given to no visible fund, but merely upon speculation on the profits of the trade."

Lord ELLENBOROUGH, C. J. "I do not see that

* 2 *Wilson*, 169. † 1 *Brown*, 494. 1 *Term Rep.* 34.

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SUTTON v. FIVE WEEKLEY.

there is much in the words that there is a credit given to any uncertain capital or to a certain capital, every man gives credit to another to the extent of his solvency."

POOLEY then cited *ex parte Harrison,** and *Parker* v. *Wells,* in both of which cases it was held by Lord *Mansfield,* and Mr. Justice *Buller,* that where the party kept a public sale kiln he was a trader. And a man may be a trader carrying on business or a trade upon his own land, substantially as a tradesman and independently of his occupation of the land, but if he does merely that which is necessary to take the produce of his own estate that will not be a trading within the bankrupt laws.

LE BLANC, J. "The character of land owner then must be supposed to cease the moment he digs the clay out of the pits."

Lord ELLENBOROUGH, C. J. "You do not contend that if he burns only for his own use that makes any difference, or that it can in that case be said to be a manufacture."

LAWRENCE, J. "You do not mean to say that it is not the usual mode of carrying the produce to market to dig the clay and sell it. Then if a man comes to an estate, and finds a quantity of brick earth which has been usually made into bricks and sold; he finds, that the best mode of taking the produce of the estate is to proceed with the manufacture, and he does so; is not that the best mode of taking the produce of the estate? I do not see why the manufacturing of the clay makes him a trader."

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* *Brown,* 173.

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SUTTON *versus* WEELEY.

WETHERELL, for the *defendant*, contended that the bankrupt was not a trader within the meaning of the statute. That he was the occupier of his own land, bringing the produce of it to market in the most advantageous manner. That if the argument for the *plaintiff* were to prevail the greater part of Lord *Mansfield's* arguments delivered in his judgment upon the case of *Parker* v. *Wells*, was wholly superfluous, for it would have been sufficient to have decided shortly upon the ground that, no matter how the brickmaker gets his materials, if he makes bricks for sale, he is a dealer and a trader within the meaning of the statutes against bankrupts. That if the bankruptcy were good in this case, the same rule might apply to almost every great landholder in the kingdom who possessed mines, alum, salt, or brick earth, or clay upon his estate. That in order to bring the trading within the statutes there must be a buying as well as a selling, the former of which was wanting in this case.

And now the opinion of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case. "This case is distinguishable from that of *ex parte Harrison*;* where the brickmaker took a piece out of the waste, and made a compensation to the lord of the manor for the soil used in his manufacture; and also from the case of *Parker* v. *Wells*, inasmuch as the earth procured in that case was acquired for the very purpose of making it into bricks. It is not necessary to say what would be our opinion if a case were now before us similar in circumstances. But here upon the death of *Weeley*, the *defendant* took the estate as devisee, and he made the bricks from it, not buying one thing except the coals and a part of the wood. In this case

* *Brown*, 173.

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he is like the burner of his own chalk or rock into lime, the smelter of his own ore, or the manufacturer of rock into alum. What reason is there for making a distinction between the two cases, in which there is really no material difference. For in order to smelt the ore considerable capital must be employed, and much labour used, and some ingredients are necessary to be bought in order to make rock into alum, and there is no greater virtue in the raw materials, nor are fewer articles required to make those commodities saleable than in this case. In the several cases of the lime burner, and the alum manufacturer, the ground of the decision is that although the surface of the earth produces some profit, yet the selling it in the state in which it is altered by the manufacture, is held not to alter the character of the landholder. His lordship then took a review of the statute 34 and 35 *H. VIII.* c. 4, and also of the 13 *Eliz.* c. 7, s. 1, and concluded that under all the circumstances of this case, the *defendant* was neither a person living by other mens' substance within the principle of the former statute, nor was he one who gained his living by buying and selling within that of the latter.[a]

JUDGMENT for the DEFENDANT.

The KING *against* the Inhabitants of the Parish of RUSHALL in WILTS.—11th *June*.

Where a servant who was hired for a year on the 18th *of* October, *with liberty to quit on a month's notice or a month's warning, gave notice to quit at old* Michaelmas, *and upon applying to her mistress for wages, she told her that she had a week to serve, the servant offered to serve the week, but the mistress said it was no matter, she had got another servant in the house, held that this was a dissolution of the contract, and not a dispensation of service.*

1806.

The King *versus* the Inhabitants of Rushall.

AT the general quarter sessions for *Sussex*, held on the 14th of *January*, 1806, an appeal was entered and rested until the next sessions. At the general quarter sessions held at *Midhurst*, for the county of *Sussex*, the 15th of *April*, 1806, it is ordered as follows: that is to say, upon the appeal of the parishioners of the parish of *Rushall* in the county of *Wilts*, from an order or warrant of two justices of the peace for the said county of *Sussex*, for removing of *Susannah Whit*, singlewoman, from the parish of *Wiston* in the said county of *Sussex*, to the said parish of *Rushall*, and upon hearing of counsel on both sides, it is ordered by this court that the said order or warrant of the said two justices of the peace be confirmed, and by this court it is confirmed accordingly; subject nevertheless to the opinion of his majesty's court of *King's Bench* at *Westminster*, upon the following case, viz. the pauper being 30 years of age, and being a native of *Wiltshire*, and her mother and other relations living near *Rushall*, sometime before old *Michaelmas* day 1802, the time at which the service in which she was then living, at *Wiston* in *Sussex*, was to end, wrote to her mother desiring her to look out for a place for her; which she did and in consequence treated with Mrs. *Peck*, wife of the Rev. *Kenrick Peck*, of *Rushall*, *Wilts*. Upon which Mrs. *Peck* informed her that she would give her the same wages as she did to her other servants (being ten guineas a year and a guinea for tea), and wait till she came down, and desired that she would come as quickly as she could, but the mother made no absolute agreement for her daughter, but afterwards informed her that she had got a place for her if she liked it. The pauper left her service in *Wiston* immediately on its expiration, and went into *Wiltshire* without delay, and arrived on *Saturday* the 16th of *October*, at her mother's near *Rushall*, and on *Monday* the 18th, Mr. *Peck*

1806.

The KING *versus* the Inhabitants of RUSHALL.

applied to her to know if she liked to come into his service, saying that he wanted her to come immediately as he had company to dinner. She went to Mr. *Peck's* house, and then it was for the first time agreed between Mrs. *Peck* and her, that the wages should be ten guineas for the year and a guinea for tea (which was the same as she had given to her other servants) with liberty of parting at a month's wages or a month's warning. She then went to work, and continued in Mr. *Peck's* service until old *Michaelmas* day following. About five weeks before that, she gave her mistress notice, that she should quit her service at the next old *Michaelmas* day following. On the said old *Michaelmas* day 1803, the pauper came to her mistress to receive her wages, who paid her the whole year's wages, and the guinea for tea, but told her she wanted a week of serving out her year. The pauper said she was willing to stay another week, but the mistress replied that it did not signify, as she had got another servant in her place who was then in the house (which she in fact was), she then left the house and never returned into the service afterwards; upon which facts the court of quarter sessions were of opinion that the pauper was settled at *Rushall*.

TOPPING and DOYLEY, in support of the order of sessions; "This is a case upon a question of whether there was a dissolution of the contract: or a dispensation of the service; and it is a dispensation of the service and not a dissolution of the contract, for when the servant applied to her mistress, she said she did not consider that she could quit at *Michaelmas* 1803, and told her that she had not served her year, but had another week longer to serve, and there is nothing in the case to shew that either one or the other thought the contract was dissolved, the maid afterwards saying she is willing serve for the week. Although the mis-

1806.

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ess does not say that she will keep her, yet she does ot say that the contract is at an end, but that it does ot signify as she has got another servant in the house. all the cases the court has been rather inclined to ok to a dispensation than a dissolution of the con act."

Lord ELLENBOROUGH, C. J. without hearing the ther side; "Has not the court in the cases of the *King* v. *Sudbrook*,* and the *King* v. *King's Pyon*,† laid own, that the mode of trying the question, whether it s a dissolution of the contract or not, is to see whether he master has the means of compelling the servant o return to the service. Here then was no absolute greement made by the mother, for her daughter, but when she got to Mr. *Peck's* house it was for the first time agreed that she should have ten guineas a year and a guinea for tea, with liberty to quit at a month's wages or a month's warning. She gives notice a month before her time is up, and, at old *Michaelmas* day, when the notice expires, goes to her mistress for her wages, who says that she will give the wages, but she has a week longer to serve, and she, the pauper, says she is willing to stay another week; but the mistress replies that it does not signify, because she has another servant in the house. The question is whether this is enough to determine the contract, and if it is, there is no settlement gained. Now can there be a doubt of it? The one says I will quit at the end of the month, being old *Michaelmas* day, the other after some objection says, there is your money I have got another servant. If any body had harboured this person could one say that an action would be maintainable on the supposed existence of the relation of master and servant?"

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* 4 *East*, 356. † 4 *East*, 351.

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GROSE, J. "There must be in these cases a serving for a year under a hiring for a year. The hiring is not very expressly stated, but it appears to be for a year, and the servant had liberty of quitting on a month's notice. In that county hiring is generally at old *Michaelmas* day, and she gives notice in order to quit at old *Michaelmas* day, that she may the better get a service. The mistress considers that as a good notice, and hires another servant."

LAWRENCE, J. "Here are two questions. First, whether the hiring is not for a year from old *Michaelmas* day, and if not, whether the interval between the old *Michaelmas* day and the 18th of *October* was dispensed with, as to the service. Upon the first question there is no pretence to say, that the hiring was before the 18th day of *October*. She applied to her mother at old *Michaelmas* day to get her a place, but though terms were proposed, no absolute agreement was made; and, at the 18th of *October*, nothing is said as to any thing which has passed, but the agreement is, to be paid ten guineas a year, a guinea for tea, and liberty to quit at a month's wages or month's warning. The service commences from that time; both parties so consider it. Then, at the expiration of the notice, the mistress says, here is your wages for a whole year, but you have a week more to serve. The girl does not stay until the week is up, but says, she is willing to serve the week. No, says the mistress, I have got another servant. This is clearly a dissolution of the contract."

LE BLANC, J. "The sessions have not found when the hiring was, but it cannot be contended that it is a hiring from the day when the mother had conversed with Mrs. *Peck* as to her daughter's coming to live with her; but in the absence of other circumstances to fix the time, it must be taken from the 18th of *October*. The next question is, whether there was a dispensation

of the service between the two days. As to that point, the agreement for putting an end to the service at a month's warning distinguishes it from the cases of dispensation, for the servant after giving due notice has determined the service."

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ORDER of SESSIONS quashed.

The KING *against* the INHABITANTS of TOPSHAM, DEVONSHIRE.—*June* 11th.

A pauper apprenticed to a mariner of Topsham, *to serve on board a ship trading from* Poole *to* Shields, *is at* Poole *with the vessel in the course of his service, where his master becomes a bankrupt, and the service is terminated, and there resides more than forty days sleeping on board the vessel; held, that he gains a settlement at* Poole.

Pauper. Settlement. Apprentice. Mariner.

UPON an appeal to the court of quarter sessions by the churchwardens and overseers of the poor of the parish of *St. James*, in the town and county of *Poole*, from and against an order made by two justices, whereby *Samuel Cotter* was removed from the parish of *Topsham* in the county of *Devon* to the parish of *Poole* or town and county of *Poole* aforesaid as the place of his last legal settlement. This court upon hearing all parties concerned and their counsel, doth quash the said order, and the same is hereby quashed accordingly, subject to the opinion of the court of *King's Bench* on the following case:—It appeared that the pauper *John Cotter*, at the age of twelve years, was bound by indenture apprentice as a mariner to *David Sweetlands* of *Topsham*, ship-owner and coal merchant. He served his said master for three years, during which he made several voyages and returned to *Topsham*, residing there the intervals between the voyages, sometimes two months. His last voyage was on board the *Reward* of *Topsham*, which sailed first to *Shields* and

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from thence to *Poole* with a cargo of coals. The pauper remained at *Poole* upwards of forty days, and slept every night, during that time, on board the said vessel as it lay alongside the quay. He learnt, whilst he was there, that his master was become a bankrupt, and gone from *Topsham*, in consequence of which he applied to Mr. *Penny*, the agent and consignee of the vessel, for money to enable him to return to *Topsham*. The agent supplied him with half a guinea for that purpose. On his arrival there he resided with his uncle; not being able to find his master whom he has never seen or served since. The indentures were offered to be given up by one of the assignees of *Sweetland*, but were not in fact given up until after they expired. Before the merits of the case were gone into at the sessions an objection was taken by the counsel for the appellants to the order for its uncertainty, and in other respects it was proved that there was no such parish as *Poole*, but that the parish is *St. James's* in *Poole*. In that town and county there is no parish but *St. James's*; but this objection was overruled.

Sir VICARY GIBBS and PELL endeavoured to bring this within the case of casual residence at a watering place.

EAST, *contrà*, was not heard.

BY THE COURT. "This is not like a casual residence; it is the only residence which he can have in the course of his apprenticeship. If he were not settled in *Poole* he could not be settled any where in *England*."

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Devise to A. for life, remainder to the lawful issue of her body in such parts, shares, and proportions, manner and form as she by will should limit and appoint; and, in default thereof, to all and every the children of A. and their heirs, as tenants in common and not as joint tenants, and in default of such issue to the right heirs of the testator: Held that a child of A. took an estate in fee and not in tail.

Devise. Estate in fee.

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ON a motion for a *mandamus* to the lord and steward of the manor of *Chertsey Bermond* in the county of *Surry*, to admit *Thomas Hoade* to the entirety of certain copyholds, held of the said manor. It was by the permission of the court, and with the consent of *John Acton*, (the person interested in resisting the rule), agreed that the facts might be stated for the opinion of the court, and that the issuing of a peremptory writ of *mandamus* should depend on their opinion, whether the said *Thomas Hoade* is entitled to the entirety of such premises or only to an undivided moiety of them as tenant in tail in common, with the said *John Acton*. In pursuance of this permission the parties have mutually admitted the following facts: 2d of *February*, 1780, *William Goring* being seised of the premises in question, and having surrendered them to the use of his will, and having an only child *Rebecca*, the wife of *John Hoade*, by his last will duly executed, devised the same as follows:

"I give and devise unto my daughter *Rebecca Hoade*, all that my messuage with the appurtenances situate and being in *Chertsey* on the east side of a street there called *Windsor* street, and now in the occupation of *Joseph Cobb*. And also my copyhold lands in *Chertsey* aforesaid called *Dubles*

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Brooks, to hold to her and her assigns, during her natural life; and from and after her decease, I give and devise the said messuage and lands unto my grandaughter *Rebecca Hoade* and her assigns, during her natural life; and from and after the determination of that estate, I give and devise the said messuage and lands unto *Francis Haynes* and *John Hoade*, and their heirs, during the life of my said grandaughter *Rebecca Hoade*, upon trust to preserve the contingent remainders hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; nevertheless to permit and suffer my said grandaughter *Rebecca Hoade* to receive and take the rents, profits, and issues thereof, during her natural life. And from and after the determination of that estate, to the use and behoof of the lawful issue of the body of the said *Rebecca Hoade*, in such parts, shares, and proportions, manner and form as the said *Rebecca Hoade* my grandaughter, whether sole or married, shall by her last will and testament in writing, attested by three or more credible witnesses, or by any deed or writing purporting to be her last will and testament to be executed in the presence of the like number of witnesses, direct, will, limit, or appoint the same, and, in default of such direction, will, limitation, or appointment, to the use and behoof of all and every the children of my said grandaughter *Rebecca Hoade*, lawfully to be begotten, and their heirs as tenants in common, and not as joint-tenants, and in default of such issue, to the use of my own right heirs for ever."

The testator died in 1780, leaving the said *Rebecca Hoade*, his daughter and also the said *Rebecca Hoade*, the grandaughter and devisee, and two other grandchildren, viz. *Thomas Hoade*, the prosecutor of the mandamus, and *Ann Hoade*, (who afterwards intermarried with *Samuel Acton*, and is since dead, leaving the said *John Acton* her only son), the brother and sister of the said *Rebecca Hoade*, the grandaughter. Mrs. *Hoade* the daughter held the premises in question from the testator's decease till her death in

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'90, when her daughter *Rebecca* took possesion; the last named *Rebecca* married *Benjamin ailey* who died in 1796; and she herself died in 1797 ithout having made any effectual direction or apointment of such premises, leaving an only child *lary Ann Bailey*, who by her guardian received the nts, but was non admitted, and died an infant and ithout issue on the 15th of *February*, 1802. The proecutor is her maternal heir at law. *Ann Acton* survived er sister *Rebecca Bailey*, and died in the life-time of *lary Ann Bailey*, leaving the above *John Acton* her nly son, who on the 24th of *January*, 1804, was admitted (by his guardian) to an undivided moiety of the aid copyhold premises.

MARRYAT. "The prosecutor contends, that the ibsolute fee vested in *Mary Ann Bailey*, the infant, ıfter the decease of her mother, who is described in he will as the testator's daughter *Rebecca Hoade*. The *defendant* claims a moiety under the devise over in default of such issue, he being the testator's heir at law, and *Acton* being entitled to the other moiety. The question arises upon the construction of the devise over after the life estate to the issue of the body of *Rebecca Hoade*, and the subsequent devise over to the children of *Rebecca Hoade*, and it must be contended that 'lawful issue of the body' means heirs of the body. So the word children of *Rebecca Hoade* must mean the same thing. An heir may be a collateral heir, but children must mean issue of the body. In *Doe* d. *Comberbach* v. *Perryn*,* there was a devise to *Dorothy Comberbach* for life, with a power of leasing for a term not exceeding seven years; remainder to all and every the children of *Dorothy Comberbach*, begotten or to be begotten on her body by his nephew *James Com-*

* 3 *Term Rep.* 484.

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berbach and their heirs for ever, to be equally divided, if only one child then to such one and his heirs; and in default of such issue to *James Comberbach* for life; and after the decease of the survivor of *Dorothy* and *James Comberbach*, without issue as aforesaid, to and among all and every the children of his nephew *Roger Comberbach* and of *B. Perryn* respectively begotten or to be begotten on the bodies of their respective wives, and to his niece *E. Adams*, and to the heirs of such children of *E. Adams* respectively in manner therein mentioned; remainder to the devisor's own right heirs. And the question was, whether by the birth of a son of *James* and *Dorothy Comberbach*, the contingent remainders were not defeated? and the next question, whether in consequence of their children dying in the life-time of *James* and *Dorothy Comberbach* they would not revive, the interest of the children never taking effect in possession although it vested in interest? And it was held, that by the birth of such a child, who died in the life-time of the tenant for life, the remainder over was defeated. Here the child was in possession, and there is nothing in this case to turn upon the remainders being divested by the birth of a subsequent child as in that case, but whether this infant did not take the estate in fee. It was said in that case that there were plain words importing a fee, and there was nothing by necessary implication to divest it; that in default of such issue could not apply to the heirs but only to the children of the devisee: that it was not in default thereof, which might include the heirs, but in default of such issue, which could not apply to the heirs. *Lodington* v. *Kyme** was devise to *A.* for life, and, if he has issue male, to such issue male and his heirs, and, if he die without issue male, to *B.* and his

* *Salk.* 224.

eirs; held, *A.* has but an estate for life, and both remainders are contingent. And here the object of the testator is, that if his grandaughter had issue, they should take the estate in fee, and the words in default of such issue, are sensible if referred to children, but not so if referred to and to mean heirs. In *Goodright* v. *Dunham*,* a devise to children and their heirs was held to be a remainder in fee. Here also it is given to the children and their heirs as tenants in common, and not as joint-tenants; but if they were tenants in tail, the latter words would be insensible; for there cannot be a joint tenancy in tail between a man and his sister, nor between two men, nor between any man and a woman who cannot marry with him.† He therefore contended that the devise to the children of *Rebecca Hoade* was a contingent remainder in fee, which vested upon the birth of any child, and could not be divested by his decease.

Sir VICARY GIBBS, *contrà*. "*Mary Ann Bailey*, the grandaughter took an estate tail, and on her death the limitation over to the children of *Rebecca Hoade*, namely, the prosecutor of the mandamus, *Thomas Hoade* and the *descendant* of *Ann Hoade*, the *defendant John Acton*, took effect. The testator knew that there were children both of *Rebecca Bailey* and Mrs. *Acton* alive, and he intended to provide for both of them, but if the construction in favour of the prosecutor is to prevail, then if she had several children, and all died under the age of 21 years, the eldest son of *Rebecca Hoade* or his heir would take that which he gives over to *Ann Acton* and *Thomas Hoade*. The term default of such issue may be considered as ambiguous, referring either to the children last-mentioned who are issue, or to the issue of the body of *Rebecca Hoade* first mentioned.

* *Dougl.* 251. † *Com. Dig.* Estates, K. 1 *Co. Litt.* 124.

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In *Doe* d. *Comberbach* v. *Perryn*, the words are to their heirs for ever, and though a man may sometimes mean by the words heirs, heirs of the body, yet when he uses the words heirs for ever, that must mean an estate in fee, namely to heirs that will endure for ever, and in that case the testator had expressly given an estate to one person, and the heirs of his body, a circumstance on which *Buller*, J. relied very much in giving his judgment. *Lodington* v. *Kyme*, is not strictly in point; for there the words were, if he have issue male to his heirs for ever, and if he die without issue then over. So in *Goodright* v. *Dunham*, the words were and in case he dies without issue; he gives the same premises to his daughters and their heirs, and the words were not as here, in default of such issue. Of an estate so limited in tail, there might be a joint tenancy, as, if he had given it to them jointly, whether sons and daughters or not, they would take as joint-tenants for life with several inheritances.* He cited also *Lewis* d. *Ormond* v. *Waters*.† In the case of *Ives* v. *Legg*,‡ the words in default thereof were said to comprise both contingencies; as well that of there being no children as of the devisee having children and they dying in her lifetime, and here the words in default of such issue may by reference to the first part of the sentence apply to a default of heirs of the body. This case resembles that of *Ives* v. *Legg*, and must be governed by it.

Cur. adv. vult.

And on this day the judgment of the court was delivered to the effect following, by

Lord ELLENBOROUGH, C. J. "The question raised in this case is, whether there are words in the will to

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* *Littleton*, s. 283. † 6 *East*, 336. ‡ See the note to the case of *Doe* v. *Perryn*, 3 *T. Rep.* ut supra.

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shew an intent to restrain the devise to the children of the grandaughter, *Rebecca Hoade*, and their heirs, to mean heirs of the body, and to give them only an estate tail. There is no doubt that, according to the common and ordinary meaning of the words they must take a fee. The devise is in this form: "To *Rebecca Hoade*, the daughter, for life; remainder to *Rebecca Hoade*, the grandaughter, for life; remainder to the lawful issue of her body in such *parts, shares*, and *proportions, manner* and *form*, as the said *Rebecca Hoade* my grandaughter shall, by her will, direct, will, limit, or appoint; and, in default of such direction, will, limitation, or appointment, to the use and behoof of all and every the children of my said grandaughter *Rebecca Hoade*, lawfully to be begotten and their heirs, as tenants in common, and not as joint-tenants; and in default of such issue to the use of my own right heirs." And it is said, by the limitation over in default of such issue, the testator meant his other grand children to take, if the children of his grandaughter *Rebecca Hoade* should die. If the words had been, 'and they shall die without issue,' it would have been clearly so; but that event is not expressly provided for; and why might not the testator intend to give the estate absolutely to the children of his grandaughter, if she had any, and if not, then to his right heirs? The construction contended for, that in default of such issue must mean issue of the body, would be more obvious if the devise to the children of the grandaughter *Rebecca* were an immediate devise; but that is not the case; it is a devise after a power of appointment, to the issue of her body in such parts, shares, and proportions, manner and form as she shall appoint. This in the course of the argument is said only to be a power to appoint the shares and proportions amongst the children in tail. If so that would furnish an inference that the li-

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mitation to take place in default of appointment would be an estate tail, but we think this devise gives equally a power of appointment in fee. It is not necessary to give an opinion upon that subject, yet when the words 'manner and form' are used with those applicable to a division in parts and shares, something more must be understood in order to give effect to all the words, than a mere power of unequal division of the estate in a limited descent: and if so, it must be a power to appoint in fee. Under this power the children might have an estate in fee given to them; then how can we say that by the limitation appointed as a substitution of the power, the testator did not give as large an estate as, under the power, might have been given to the children and their heirs. The limited construction contended for, upon the words in default of such issue, did not prevail in *Doe* d. *Comberbach* v. *Perryn*, though the authority of *Ives* v. *Legge* was much pressed, and in *Doe* d. *Perryn*, Mr. Justice *Buller* laid it down that 'issue' and 'children' were synonymous. The limitation over in *Ives* v. *Legge* was 'in default thereof.' As to the argument of a difference between the authorities upon the words, "if he dies without issue, and in default of such issue" this is a distinction without a difference. His lordship then noticed the want of the leasing power in this case, which was in the case of *Doe* d. *Comberbach* v. *Perryn*, and again considered the effect of the power of appointment, and observed that the testator might possibly have meant a general failure of issue. He observed also that in *Lewis* d. *Ormond* v. *Waters*, it was clear the testator meant that the sons should take estate in succession, which could only be, by taking estate tail.

RULE ABSOLUTE for the PEREMPTORY MANDAMUS.

The KING *against* the West Riding of the County of YORK.—*June 21st.* 1806.

Where the road at the end of a public bridge for 300 yards lay in several parts of a parish called Mears, and was out of repair, and the county was indicted for not repairing, and pleaded not guilty; held, upon special verdict, that upon such a plea evidence of ancient usage for the mears *to repair, and not the county was inadmissible, and there must in such a case be a verdict for the crown upon the plea of not guilty, if the bridge be a public bridge, and the road out of repair.*

County bridge. Indictment. Highway. Pleading.

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INDICTMENT states that from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient king's highway, leading from the market town of *Manchester* in the county palatine of *Lancaster*, in, through, and over the township of *Quick* in the west riding of the county of *York* aforesaid, used for all the liege subjects of our said lord the king, and his predecessors for themselves and with their *horses, coaches, carts,* and *carriages*, to go, return, pass, ride, and labour, at their will and pleasure; and that certain parts of the same king's common highway at the said township of *Quick*, in the said west riding of the said county of *York*, (to wit,) a certain part thereof lying next adjoining to the west end of a certain public bridge called *Tamewater* bridge, and within the distance of 300 feet thereof, beginning at the west end of the said public bridge there, and extending from thence westwards, containing in length forty-five feet and in breadth twenty-one feet, and a certain other part thereof, lying next adjoining to the east end of the said bridge, and extending from thence eastwards, containing in length

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150 feet, and in breadth 21 feet, on the 2d day of *March* in the 42d year of the reign of our sovereign lord *Geo. III.* now king of the united kingdom of *Great Britain* and *Ireland*, defender of the faith, and continually afterwards, until the day of the taking of this inquisition at the said township of *Quick*, in the west riding of the county of *York* aforesaid, was and yet is, very ruinous, miry, deep, broken, and in such decay for want of the due reparation and amendment of the same; so that the liege subjects of our said lord the king, through the same way with their horses, coaches, carts, and carriages, could not during the time aforesaid, nor yet can go, return, pass, ride and labour, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same way going, returning, passing, riding, and labouring, and against the peace of our said lord the king, his crown and dignity, and against the form of the statutes in that case made and provided. And that the inhabitants of the west riding of the said county of *York*, the common highway aforesaid, (so as aforesaid being in decay,) of right ought to repair and amend, when and so often as it shall be necessary. To this indictment the *defendants* plead the general issue, not guilty. And the jurors of the said jury by the sheriff of the said county of *York*, for this purpose impannelled and returned, to wit, &c. at &c. being called, come, who being tried and sworn to speak the truth of and concerning the premises in the indictment aforesaid, above specified upon their oath do say that from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient king's highway leading from the market town of *Huddersfield*, in the west riding of *York*, towards and into the market

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own of *Manchester*, in the county palatine of *Lancaster*, in, through, and over the township of *Quick*, in the west riding of the county of *York* aforesaid, and across certain river called the river *Tame* there flowing, nd being used for all the liege subjects of our lord he present king and his predecessors, for themselves nd with their cattle, coaches, carts, and carriages, to go, eturn, pass, ride, and labour at their will and pleasure; nd that, from the said time whereof the memory of nan is not to the contrary, until within the time of the nemory of persons now living, there was no bridge, except a certain foot-bridge) across or over the said river *Tame* at the township of *Quick* aforesaid, for the use of persons going, returning, passing or repassing in or along the said common king's highway at the township of *Quick* aforesaid, by themselves or with their cattle, coaches, carts, or carriages; but all persons having occasion to go, return, pass or repass in and along the said highway with their cattle, coaches, carts, or carriages across the said river at the township aforesaid, went, returned, passed, and repassed during all the time aforesaid, until the time last-mentioned with their cattle, coaches, carts and carriages, in and along the said highway across the said river at the township aforesaid; in, through, and across a certain ford there; and all persons having occasion to go, return, pass or repass in and along the said highway on foot across the said river at the township aforesaid, went, returned, passed and repassed before and until, and at the time last-mentioned, on foot upon, along, and over the said footbridge erected and being at the township aforesaid, over and across the said river there, a little higher up the said river than the said ford. And the jurors aforesaid, upon their oath aforesaid, do further say that before the year of our lord 1756, a certain stone bridge called *Tamewater bridge*, was erected by subscription at the township aforesaid, across and over

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the said river there, about five or six yards higher up the said river than the said ford; for the purpose that persons having occasion to return, pass or repass in and along the said highway across or over the said river at the township aforesaid with their cattle, coaches, carts, or carriages, might and should go, return, pass and repass upon, along, and over the said stone-bridge, and the same continued so there erected and being until the same, afterwards, and about the year of our lord 1756, was swept away by a flood, when the same was thereupon rebuilt with stone by voluntary subscriptions, and made a little larger than the former bridge, and erected at the end of the said highway, next the said river, for the purpose last aforesaid, and continued so erected and built for that purpose until the month of *August* in the year of our lord 1799, when the same was again swept away by a flood, and thereupon the same was rebuilt with stone for the purpose last aforesaid, by and at the expence of the inhabitants of the west riding in the said county of *York*, and was completed and finished on or before the 2d day of *March*, in the 42d year of the reign of our said lord the king, the day in the said indictment mentioned, and from thence hitherto hath been and still is there erected, and being for the purpose last aforesaid, and that the said respective stone bridges during the respective times of the continuance thereof respectively have been publicly used by persons going, returning, passing and repassing in and along the said highway at the township aforesaid across and over the said river, there and during these respective times have been, and are of great public use and benefit, and that the same bridge so rebuilt, as last aforesaid, hath been maintained and repaired, and was and is maintainable and reparable by the inhabitants of the said riding. And the jurors aforesaid upon their oath aforesaid, do further say that the said stone bridge so last built as

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bove mentioned, was made by the inhabitants of the aid riding larger and wider than either of the said receding bridges, and that the parts of the said high- ray adjoining the said stone bridge, so last built as ast aforesaid, next adjoining to the east and west nds thereof respectively, being parts of the common ing's highway in the said indictment mentioned be- ore, and at and during the time of the building, inishing, and compleating of the said last-mentioned bridge, was made higher in order to come up to the ame bridge, and wider than the same had before been, the same having been widened by taking in some mea- dow land on both sides of the said highway in the year of our lord 1756, and again when the said stone bridge was so last rebuilt as aforesaid, and the same parts of the said common king's highway during the time that the same was so ruinous, in decay, and out of repair, as in the said indictment, were and are of the breadth of eight yards. And the jurors aforesaid upon their oath aforesaid do further say, that the township of *Quick* in the said indictment mentioned, lies, and dur- ing all the times aforesaid, hath lain within the parish of *Saddleworth* in the said riding, which said parish is and from the time whereof the memory of man is not to the contrary, during all the times aforesaid, hath been divided into four districts called mears, in one of which said mears, (that is to say) one thereof called *Shaw mear*, so much of the said highway in the said township of *Quick*, as lies westward of the said last mentioned bridge; now lies and during all the time last aforesaid hath lain, and in one other of which said mears, (that is to say,) one thereof called *Lords mear*, so much of the said highway in the said township of *Quick*, as lies eastward of the said last mentioned bridge, now lies and during all the time last aforesaid, hath lain; and that the inhabitants of the said mear called *Shaw mear*, from time whereof the memory of man is not to

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the contrary, until the time in the said indictment mentioned, during which the parts of the said highway therein mentioned, are there stated to be ruinous in decay, and out of repair, have repaired and amended, and have been used and accustomed to repair and amend so much of the said highway, in the said township, as lies or hath lain westwards of the said ford, until the building of the said first mentioned carriage-bridge, and since, of the said several carriage bridges respectively, when the same part of the said highway hath been ruinous, in decay, and out of repair, and that the inhabitants of the said mear called *Lordsmear*, from time whereof the memory of man is not to the contrary, until the time in the said indictment mentioned, during which the parts of the said highway therein mentioned, are there stated to be ruinous, in decay, and out of repair, have repaired and amended, and have been used and accustomed to repair and amend so much of the said highway, in the said township, as lies or hath lain eastwards of the said ford, until the building of the said first mentioned carriage bridge, and since of the said several carriage bridges respectively, when the same part of the same highway hath been ruinous, in decay, and out of repair, and that during the same time in the said indictment mentioned, the said parts of the said highway in the said indictment specified to be ruinous, in decay, and out of repair, were ruinous, in decay, and out of repair, in manner and form as in the said indictment is alledged; but whether upon the whole matter above found, the inhabitants of the said riding are guilty of the premises in the said indictment above laid to their charge or not, the jurors aforesaid say they are wholly ignorant, and pray the advice of the court thereupon, and if upon the whole matter above found the court are of opinion that the inhabitants of the said riding are guilty of the premises in the said indictment

above laid to their charge or not, the jurors aforesaid say they are wholly ignorant, and pray the advice of the court thereupon, &c. 1806.

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Holroyd, for the crown. "The question upon this indictment will be whether the county at large, that is the *West Riding* of the county of *York*, is liable to repair to the extent of 300 feet at the ends of this public bridge. It is stated, in the special verdict, that it has been the practice, within the parish, for the roads to be repaired, not by the parish at large, but by the inhabitants of each mear into which it is divided. That circumstance makes no difference, and throws no liability on any other parties than the *defendants*, upon these proceedings. If they meant to say that, by reason of any special circumstances, this *mear* was liable, they should have so pleaded it; but the question now being, upon the pleadings as they now stand, whether the inhabitants at large are guilty of the facts charged in the indictment, and those facts being simply, that there is a highway, that it is to be repaired by the county, that it is out of repair and that the county are liable, then it being found that a particular district is liable as the parish or county would be, the plea of *not guilty* leads to the same question as if it was to be done by the county at large; exactly in the same manner as upon an indictment for not repairing a common road with the plea of *not guilty*. By the preamble and purview of the statute 22 H. 8, c. 5,* it seems to be taken

* By 22. H. VIII. c. 5. it is enacted 'that the justices of peace in every shire of this realm, *franchise*, *city*, or *borough*, or four of them at the least, whereof one to be of the *quorum*, may inquire, hear and determine, in their general sessions, of all manner of annoyances of bridges broken in the highways, to the damages of the king's liege people, and to make such process and pains upon every presentment afore them, for the reformation of the same, against such as owen to be

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for granted that, by the common law, the county was bound to repair a public bridge, and it is so laid down

charged for the making or amending of such bridges, as the king's *justices of his bench use commonly to do;* or as it shall seem by their discretions to be necessary and convenient for the speedy amending of such bridges. And by 22 H. VIII. c. 5. s. 2 and 3, where it cannot be known and proved what hundred, wapentake, city, riding, borough, town or parish, nor what person certain or body politic, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as owen to make them, for the most part lie long without any amendment, to the great annoyance of the king's subjects; in every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding, within which the said bridge decayed shall happen to be: and if it be within any city or town corporate, then by the inhabitants of every such city, or town corporate, wherein such bridges shall be. And if part of such bridges so decayed happen to be in one shire, riding, city, or town corporate, and the other part thereof in another shire, riding, city, or town corporate, or if part be within the limits of any city or town corporate and part without, or part within one riding, and part within another, that then in every such case the inhabitants of the shires, ridings, cities, or towns corporate, shall be charged and chargeable to amend, make and repair such part and portion of such bridges so decayed, as shall lie and be within the limits of the shire, riding, city or town corporate, wherein they be inhabited at the time of the same decays. And by 22 H. VIII. c. 5, s. 4, it is further enacted that in every such case where it cannot be known and proved what persons, lands, tenements, and bodies politic, owen to make and repair such bridges, that for speedy reformation and amending of such bridges, the justices of the peace within the shires or ridings wherein such decayed bridges being out of cities and towns corporate, and if it be within cities or towns corporate, then the justices of peace within every such city or town corporate, or four of the said justices at the least, whereof one to be of the *quorum*,

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in several writers upon the subject, and also that they were bound to repair the 300 feet at the ends of the

within the limits of their several commissions and authorities, may call before them the constables of every town and parish, being within the shire, riding, city or town corporate, as well within liberty as without, wherein such bridges or any parcel thereof shall happen to be, or else two of the most honest inhabitants within every such town or parish in the said shire, riding, city or town corporate, by the discretion of the said justices of peace, &c. And at and upon the appearance of such constables or inhabitants, the said justices of peace, &c. with the assent of the said constables or inhabitants, may tax, and set every inhabitant in any such city, town or parish, within the limits of their commissions and authorities, to such reasonable aid and sum of money, as they shall think by their discretions convenient and sufficient for the repairing, re-edifying, and amending of such bridges. And by 22 H. VIII. c. 5, s. 4. after such taxation made, the said justices shall cause the names and sums of every particular person so by them taxed, to be written in a roll indented; and shall also have power and authority to make two collectors of every hundred, for collection of all such sums of money by them set and taxed; which collectors receiving the one part of the said roll indented, under the seals of the said justices, shall have power and authority to collect and receive all the particular sums of money therein contained, and to distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods, and chattels and to sell such distress and of the sale thereof, retain and receive all the money taxed, and the residue (if the distress be better) to deliver to the owner thereof. And by 22 H. VIII. c. 5. s. 4, the same justices or four of them, within the limits of their commissions and authorities, may also name and appoint two surveyors, which shall see every such decayed bridge repaired and amended, from time to time as often as need shall require, to whose hands the said collectors shall pay the said sums of money taxed and by them received, and that the collectors and surveyors and every of them, and their executors, and

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bridges. This statute directs what shall be done with respect to the repair of bridges; namely, that, in every such case there mentioned, they shall be repaired by the inhabitants at large, and gives the justices of the peace in particular counties, particular powers for the repair of bridges, and also powers to tax the several divisions of the county for that purpose.*

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administrators, and the executors and administrators of them, and every of them, from time to time shall make a true declaration and account to the justices of peace of the shire, riding, city, or town corporate, wherein they shall be appointed collectors or surveyors, or to four of the same justices, whereof one to be of the *quorum*, of the receipts, payments and expences of the said sums of money. And by 22 H. VIII. c. 5. s. 8, that the said justices, &c. may allow such reasonable costs and charges, to the said surveyors and collectors as by their discretion shall be thought convenient. And by 22 H. VIII. c. 5 s. 9, that such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining, to any ends of any bridges within this realm, distant from any of the said ends by the space of 300 feet be made, repaired and amended, as often as need shall require, and that the justices of peace in every shire of this realm, franchise, city or borough, or four of them at the least, whereof one to be of the *quorum*, within the limits of their commissions and authorities, may enquire, hear, and determine in their general sessions, all manner of annoyances of and in such highways so being and lying next adjoining to any ends of bridges within this realm, distant from any one of the ends of such bridges 300 feet; and to do in every thing concerning the making, repairing, and amending such highways, &c. in as large and ample manner as they might and may do to and for the making, repairing and amending of bridges, by virtue of the said act.

* LORD ELLENBOROUGH, C. J. "How does this case come before us for judgment?"

HOLROYD. "I had supposed, that the judgment should

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From this provision in the statute, that the justices shall tax all the inhabitants of the county, it seems, that the legislature acts on the idea, that the repairs of this part of the road were to be done by those who were to be taxed, namely, the county at large. If it had only been said, that the *highways* should be repaired as need be, it would not have followed that they would have been liable; but it goes on to give them power to do "in every thing concerning the making, repairing, and amending such highways, &c. in as large and ample manner as they might and may do, to and for making, amending, and repairing of bridges by the said act:" then it follows, that they may tax the divisions of the counties; but that would be idle unless they were liable to the repair. Upon the statute it has been held, with respect to bridges, that it is only declaratory of the common law, and that the course of proceeding prescribed by the act, is not necessary to be pursued; but that an information, as at common law will lie.* It is to be observed, that here the road has been altered, widened, and heightened by the *mears:* but what has been done by the mears, will not take the case out of the general question; for the indictment lies, of common right, against the whole riding, and if the riding means to say, that the mears are liable, they should not have pleaded not guilty, but should have pleaded a special plea, that by prescription, there is an obligation on the mear to do it. This they have not done, and, on the plea of not guilty, the prosecutors had only to shew, that there is a road as described, which is out of repair. The only question then before the

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be given in the court below; I enquired, and was informed, that the practice was otherwise; that on special verdicts they certify to this court, which is to give judgment."

* 2 *Instit.* 701.

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court is, whether they are guilty of the charge, and this evidence ought not to have been received; for the defence could only be that the bridge and the road were not as described; or that the road was not out of repair. This is the case with a parish so pleading to an indictment for not repairing a road: liability *ratione tenuræ* cannot be given in evidence on the general issue; so here the evidence stated should either not have been given, or cannot affect the real question upon the record. Upon the general question, whether at common law or by the statute, the county is liable to the repair, it will appear that, both upon the reason of the thing and the authorities, this prosecution is well founded. First, the reason given by Lord *Coke*, 2 *Instit.* 705, for the county being liable to repair the bridges is, that the parish is more burthened by reason of a bridge as to its highways; for it brings a greater resort of persons thither, and a bridge affords a communication for all people to the county on the other side, who, would not otherwise be enabled to come there." He referred also to *Dalton*'s Justice.

Lord ELLENBOROUGH, C. J. "Does he cite any authority as to that position; does he refer to any record?"

HOLROYD. "As to some of his positions he cites no authority, he refers to no record. It seems to be a statement of what has been mooted."

Lord ELLENBOROUGH, C. J. "Probably it was a question reserved at the assizes."

HOLROYD. "In 43 and 37 *Bro. Abr. Presentments in Courts*, it is stated, that it was presented, that the abbot of T. ought to repair the bridge of T.; who pleads that, heretofore he traversed a like presentment, when it was found that he ought only to make

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two arches in the middle; and per *Knivet*, it is not a bridge without the residue, and it is not stated who is to make the rest, therefore the *defendant* shall make the whole if he can say no more, and he may make the bridge without licence from those who have lands adjoining. I cite this to shew, that where the obligation is to repair a bridge, the repair of the highways at the end is consequential. You are bound to repair a part, and therefore, not being wholly exempt nor having shewn who is bound to repair the residue, you are bound to repair the whole. 'Such as are chargeable to repair a bridge, may use adjacent land; and where one is bound to repair a bridge, he is bound to repair the highways at the end;' *Dalton's Justice*, 46, cites *Crompton*, 186, b. The statute 1 *Anne*, c. 18, recites the statute 22 *H. VIII.* and proceeds upon the ground of that statute, and takes it for granted that the county is bound to repair. Money is directed to be laid out for the repair of bridges, and the highways at the ends of bridges, and there is a penalty on the constable for neglecting to assess the counties to the repair of bridges, and the highway at the end thereof. This is a legislative exposition of the statute 22 *H. VIII.* and many of its provisions, are useless, unless the county is liable to the repair of the highways, at the extreme ends, as well as the bridges."

Lambe, *contrà*. First, the county is not liable at common law to repair highways at the ends of bridges. Secondly, it being found that other persons are liable by prescription to repair, they are not bound, in the case stated by this special verdict. It is too late now to say that the riding or county are not liable to repair bridges of public utility; but there is a great difference between the repair of bridges and of highways. As to bridges, the county is bound by the common law; but it is not so as to highways; for

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the parish and not the county is bound to repair them at common law. As to the objection, therefore, that this evidence cannot be given upon the general issue, it may be admitted that it would be so, if the county were liable at common law; but if not so liable, then it is incumbent on the prosecutor to shew, that there is some specific ground upon which they ought to be charged, and they, the county, may shew the contrary, by evidence of usage upon the general issue. The statute 22 *H. VIII.* gives the justices power to hear and determine against such as owen to be bound, which shews that it did not mean to charge the county but where others were not liable: and some discretion was necessary to be invested in the justices, in order to enable them to lay out the immense sums of money which they have done under this act. Thus, where it cannot be known who ought to repair, the county is to repair, and the justices are to assess them.* Then the 9th section, which gives the justices power as to the 300 feet at the end of the bridge, is not intended to extend the obligation upon any one, to repair or create any where it did not antecedently exist, but only to say that the justices shall direct how it shall be repaired; which answers sufficiently the argument that the provisions would be useless unless the riding is liable. It does not say that the county at large shall be liable to repair, but leaves it to the discretion of the justices. It is just as reasonable that the county should repair the whole highway as the 300 feet. In every instance put in this statute, the material point to be inquired into is, whether any other person is liable; for in no other case are they, the county, to be liable. By this act the justices have a discretion as to how much shall be repaired, and until that discretion is once exercised, the county is not liable."

* 22 *H. VIII. c.* 5, *s.* 2, 3.

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Lord ELLENBOROUGH, C. J. "Nothing is said as to the highways; but it is said in respect to the bridges. This statute is a regulation of what was before undefined. I do not see that it gives the justices a discretion. If they have any discretion, it may be only to order 50 feet or more or less to be repaired, that being the only part out of repair."

LAWRENCE, J. "There might have been a question how much of the highway belonged to the bridges, and how much not; and does the statute do any thing more than define that? It is, as you would argue, a discretion in the magistrates to say, from time to time, how much ought to be repaired, and till they have said what they ought to repair, the inhabitants are not bound to repair. But do you mean to say that if there are 300 feet at the end of the bridge out of repair, the magistrates are not bound to compel the county to repair. What makes the county liable? The statute. Then must they not be indicted until the magistrates have made an order? Did you ever hear of a mandamus to the magistrates to exercise their discretion on this subject?"

LAMBE. "The case of the Abbot of T., in 43 *Ass.*, is perfectly unintelligible. There he pleads specially, as we are required by the prosecutors in this case, and yet they overrule his plea; and it is only the opinion of one judge, who says merely that the court will not discharge him, until he finds some one who is liable to the repair of the highway at the end."

Lord ELLENBOROUGH, C. J. "The case may be liable to some objection, perhaps, as to some point of form, which it is difficult to ascertain now; but it is clear as to the general apprehension of the law, at that time, upon the subject of the repair of bridges."

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LAMBE. "Then it comes to the question whether these two divisions being found to have repaired, the county ought not to be discharged, and the stat. 3d *Anne* contains orders for bridges and highways. The act says, that they shall not exceed these limits of 300 feet, but not that they shall go to such limits, and therefore the proceeding ought to be before the justices to say how much shall be repaired. Section 8, shew that the act is not to affect bridges or highways which others were liable to repair. As to the statute 12 *Geo. II.* c. 29; that gives an easy remedy for the recovery of rates in cases where the county is liable. The words are 'usually or of right ought to repair,' and though bridges and highways are put upon the same footing, still the act applies only to cases where the county and none other are liable."

HOLROYD, in reply. "The objection taken to the proceedings on the part of the crown seems to rest upon these points, that although the county is liable under the statute, yet not being liable at common law, the present remedy by indictment does not lie. But it is clear by 2 *Inst.* 701, that there has been always a remedy by indictment, independently of the statute, and that you may proceed without pursuing the remedy in the statute. Lord *Coke* says expressly, that the presentment may be before the justices of the *King's Bench*, the justices in eyre, &c. It is contended that the whole of this act of parliament applies, only where no other person is liable, that at common law the county is not liable, and that therefore the liability of other persons need not be pleaded. But Lord *Coke* says that the liability is on the whole county, with respect to bridges, and that if other persons are liable, they must plead it, and the plea of not guilty lets them in only to a defence similar to that in case of highways in parishes. All the statutes proceed upon the understanding, that the repair of bridges is in-

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posed upon the county, at the common law. In the case of *Rex* v. *Norwich*,* as to three bridges in the corporation of *Norwich*, it was held that the evidence that others were bound to repair, could not be given upon not guilty; and the authority of the cases is very strong, that the liability does not arise out of the statute."

Lord ELLENBOROUGH, C. J. "Supposing the obligation were first created by the statute, would it not be then also necessary to plead it? It is laid down by Lord *Coke* that the statute is only in affirmance of the common law; and that the 300 yards at the end of the bridge are on the same footing as the bridge; and inasmuch as part of the highway must be put out of repair by the repair of the bridge, this statute defines only as to a certain limit, what though before indefinite, must have been clearly liable to repair by the same persons who repaired the bridge. The only question must be, whether inasmuch as the parish has been liable to repair up to the making of the bridge they are now liable or not. The moment the bridge is dedicated to the public use, it becomes a public bridge, and attracts all the consequences of an ancient bridge Then, the road at the end of all public bridges for 300 yards is to be repaired in like manner as the bridge. It is however fit to consider, as a point made in this case, whether the county ought to have pleaded the special matter or not."

Cur. adv. vult.

And now in this term, the argument being in *Easter* term last, the judgment of the court was delivered shortly to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the plead-

* 1 *Strange*, 177.

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ings and the special verdict. "The single question on these pleadings is whether the highway, joining to a common bridge at each end thereof for 300 feet, is of common right to be repaired by the inhabitants of the county at large; in other words, whether a different rule of law prevails, with respect to the 300 feet of the road, at each end of the bridge, from that which prevails, with respect to the bridge itself? It is, by the form of the pleadings, admitted on the part of the *defendants*, that the repair of the bridge does, at common law, fall on the inhabitants of the county, and, that the highway for the 300 feet is subject to the same rule, inasmuch as they have pleaded *not guilty*, and have not stated that any persons are liable. That, at common law, the county is liable to the repair of a public bridge is clear, and, after the case of the *King* v. *the West Riding of Yorkshire*,* they cannot say, that they ought not to be charged for the bridge itself. But they have endeavoured to separate the highway from the bridge itself. By the statutes however, the highway for the limits of 300 feet at each end of bridges, is dependent on the bridge, as to its dimensions, and the repair of it is to be ordered in like manner. But it is said that there is no reason to construe this statute as declaratory of the common law in this respect; and that, at least, it introduces a new law with respect to the road at the ends of bridges. But there is not any thing in the statute which favours this construction; all its clauses coupling the bridge with the highway at the end of the bridge. And so it seems was the law in the time of *Edward III.* For in 43 *Ass.* and *Brooke's Abridgment, presentment of courts*, pl. 22. it was presented in the king's bench that the abbot of T. ought to repair the bridge

* 5 *Burr.* 259. See also *Rex* v. *Cumberland*, 6 *T. Rep.* 196.

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Chesterton, in the county of *Lancaster*: He pleaded that he had before been indicted, and pleaded that he was not bound to repair, except two arches, and at issue was found for the *abbot*; and the record was read; whereupon the jury, &c. do say, that the *abbot* of T. is not bound to repair, except two arches, and not the ends of the bridge. But the court held, that they would intend that he must repair the ends of the bridge to the highway at the other side, and that he was bound to pursue the course of the water, and repair the ends of the bridge and the highway without leave of him to whom the land belongs. It was found that, without doing so, it would be of no avail, and it does not discharge him to say, that he is bound only to repair part; for, if he is to repair the bridge, he must, at common law, be bound to complete it; therefore says '*Knivet* see whether you can say any thing else.' From this case it appears that in those days it was considered to belong, *prima facie*, to the party bound to repair the bridge, to repair also the ends of the bridge. This statute then defines as to the 300 yards, what might otherwise remain indefinite as to the end of the bridges, and does not in other respects alter the common law." His lordship then concluded "therefore, we are of opinion in the lax state of this record, judgment must pass for the crown, and the highway be repaired by the county."

JUDGMENT for the CROWN.

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Baston *against* Butter.—*June* 13th.

Assumpsit. Evidence. Notice. Quantum meruit.

On a quantum meruit *for work and labour, the* defendant *may give evidence that the work was not done well; and need not be put to his cross action.*

Aliter where the demand is upon an agreement for a stipulated sum, and the plaintiff has no notice of the defence; because he may be taken by surprise: which cannot happen upon a quantum meruit.

Baston versus Butter.

THIS was an action of *assumpsit*, for work and labour, and materials found as a carpenter; *plea* the general issue; which was tried at the last assizes for *Exeter*, before Thompson, B. At the trial the *plaintiff* proved, that he had been employed by the *defendant* to build him a small house, that he was at work near twelve months: the timber came from the place and the *defendant* found nails, and it appeared, that upon the balance, 3l. 14s. 7d. was due to him; no particular sum was agreed upon. The original demand was 16l. and a fraction, which had been reduced by subsequent payments. On the part of the *defendant*, the counsel offered to prove, that the work was done in an insufficient manner; that the roof was weak, that the rafters were not sufficiently supported; and, that, therefore, the plaintiff was not entitled to recover what he now claimed. The learned judge reported that he was inclined to admit the defence, but a *nisi prius* case was cited to the following effect: "*Browne* v. *Davis*,* Assumpsit for the *plaintiff* for erecting a booth at *Bath* race-ground; the price was stipulated between the *plaintiff* and the *defendant*, at twenty guineas for building it; five guineas were

* *Taunton*, 1794.

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paid, and the *plaintiff* was to take back the materials after the races. The booth was built of the stipulated dimensions, but it fell down, and *Buller, J.* ruled, that this was no defence to the present action, especially as there was a particular sum agreed for." It appeared that the ground for this decision was, that, there being a stipulated price, the party only came prepared to prove the contract, and was taken by surprise, if the question came afterwards to be tried, how the work was done. The learned judge, thereupon, refused to receive the defence in this case, and there was a verdict for the *plaintiff*.

A rule was obtained by JEKYLL for the *defendant*, to shew cause why this verdict should not be set aside, and a new trial had, on the ground that the above defence ought to have been admitted in evidence.

LENS, Serj. now shewed cause, and relied upon the cited case, and upon the surprise which the defence was upon the *plaintiff*, and urged that the party should be left to his cross action.

Lord ELLENBOROUGH, C. J. referred to a case of *Morgan* v. *Richardson*, from memory, which appeared to be decided on another point.*

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* Of this case the *Editor* took the following note, which is inserted in the publication called the LAW JOURNAL, by T. W. WILLIAMS, vol. 2, page 237.

Morgan v. *Richardson.*

A. bought goods of B. and gave a bill of exchange for the payment thereof. Upon their being sent to his order, they were found not to answer: instead of returning them, A. sold them at a reduced price, holding himself accountable to B. for the produce. B. brought an action upon the note: upon which A. paid into court the money arising from the resale of the goods. Held, that the payment of money into

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Here if no agreement is made for a specific sum there can be no surprise; because you must shew

court is an admission of the bill; and that the above defence cannot be set up after that admission, as it goes to deny the consideration for the bill.

THIS was an action against the *defendant*, upon a bill of exchange, as acceptor; with the common money counts. The original consideration for the bill was for money due for hams and tongues, sent by the plaintiff to the *East Indies*, by the order of the *defendant*. When they arrived there, they were found unfit for the market, for which they were intended, and not according to the order. The *defendant*, therefore, sold them in the *East Indies* at a reduced price; considering that it would be too expensive to return them to *England*, and that to dispose of them as soon as possible would be most for the interest of the *plaintiff*. The produce of the sale he paid into court in this action, but without applying it specially to any particular count.

On the trial, GIBBS, for the *defendant*, insisted, that the goods being sent according to order, the *defendant* was neither bound to take them, nor to pay for them; that he sold them only for the benefit of the *plaintiff*, and was only answerable to him for the produce of the sale, as for so much money had and received to his use, which did not exceed the money paid into court.

But Lord ELLENBOROUGH, C. J. before whom the cause was tried, held, that the payment of money into court was an admission of the whole declaration, and consequently of the bill of exchange; and the *plaintiff* had a verdict for the amount thereof.

GIBBS now moved for a new trial, and contended, that the money having been paid into court generally, it might be afterwards applied, at the trial, to any count, upon which it might be proved due: that here nothing was due upon the promissory note, the consideration for that having failed; but

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that it was done well, and shew how much it was worth. In the other cases, it may be well not to admit the defence, if the party is taken by surprise, and you give no notice of the defence upon the non-performance of the meritorious consideration. But, when it comes on upon the *quantum-meruit*, you come to prove the work well done; whereas in the other case, you come to prove only, that the work was done for a specific sum; to prove that the thing was done in the ordinary manner; and, if the thing was not done well, the other party should show, that he gave some

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that the plaintiff could only be entitled to demand of the defendant the money produced by the resale of the goods as money had and received to his use.

Lord ELLENBOROUGH, C. J. "This was only the common case of goods sold, which turned out not to be answerable to the terms agreed upon; and the defendant might have resisted the payment of the note altogether. But the payment of money into court generally, is an admission of the cause of action stated in the declaration, and of the bill."

GIBBS urged, that payment of money into court was not an admission that the whole of the money on the bill was due.

BUT THE COURT still refused the rule.

It should seem, therefore, that the bill, as stated in the count, must be taken to be admitted, and that although the sum may be reduced by shewing payment, or any thing which admits the bill, and yet lessens the demand, the defendant cannot set up any defence, which goes to shew the want of a good consideration for the bill; because that denies all claim upon the bill, and is inconsistent with the admission of its validity.

RULE NISI REFUSED.

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intimation as to the defence. That is rather the prevalent practice even on *quantum meruit*, but I cannot think that it is to be sustained so far."

GROSE, J. "He must be prepared to shew, that it is worth the money."

LAWRENCE, J. "The rule laid down is, I think, a good rule, provided the party is in danger of being surprised; but, if he has notice of the performance of the contract being intended to be contested, he ought to be prepared. He is only bound by the form of the contract. He is to be paid for something done; and if not done he has no right to the money: but, if you let him go on, supposing that the only question to be tried is, whether the contract was made or not, you shall not take him by surprise. The court will then say, you shall not take this defence; go to your cross action. But on a *quantum-meruit*, he comes, at all times, to prove the worth of the thing, the *quantum-meruit*."

LE BLANC, J. "It is not sufficient to shew, that the bricks and mortar were put together. It cannot be a contract merely to put it up, without regard to whether it was well or ill, even upon a stipulated price; because, if so he could not bring an action for not building well; for that can only be on a contract to build well. Then, the only question is, whether the party is to be taken by surprise? for, if the party put it upon the record and said, true it is, I did promise to pay the man a particular sum, but he did not do the thing required, that must be a good defence. Here there is no surprise."

RULE ABSOLUTE.

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Carr *against* Jones.—June 19th.

Where the plaintiff *declared against the* defendant *for publishing a libel in an account of a trial imputing to him the crime of perjury and judicial delinquency, in his character of clerk of the court of requests at* Liverpool, *and the* defendant *endeavoured to justify 'as to such parts of the supposed libel as purport to contain an account or statement of the trial of the* plaintiff *for an assault, &c. and of the facts, circumstances, and statements, which occurred;' held, upon special demurrer, that a justification in such general and indefinite terms was bad; for although to avoid prolixity of pleading, parts of the libel might be separated and justified by distinct reference, yet this general separation of facts from observations left the matter justified wholly uncertain.*

Qu. What statement of legal proceedings may be justified?

Pleading. Libel. Proceeding of courts.

DECLARATION against the *defendant* for publishing the following libel, in a newspaper, against the *plaintiff*, an attorney of this court, published concerning him in his office of clerk of the court of requests at *Liverpool*, and charging him with perjury and with judicial delinquency. The libel which was set out with apt averments was as follows:

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"There are few things for which the present times are more remarkable, pregnant as they undoubtedly are with strange events, than for the number of prosecutions which have recently been instituted, against persons sustaining the high and certainly honourable character of judges. Both the old and the new world have astonished their inhabitants with this phenomenon; but while our attention was occupied about the affairs of judges *Chase*, *Fox*, and *Johnson*, little did we apprehend that the town of *Liverpool* would add to the list of judicial delinquents: such however has been the case. At the late quarter sessions for this *borough*, a prosecution was brought forward on *Wednesday* last

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against Mr. *Robert Carr*, a well known attorney of this town, and chief justice of the high court of conscience here, for a savage, unprovoked, and brutal attack, as stated by the counsel on the person, of Mr. *Thomas Murrow*, a young gentleman of the same profession, but of known and acknowledged respectability. In the opening of the case, it was stated and afterwards clearly and fully established by evidence, that the said Mr. *Carr* did wantonly and savagely attack Mr. *Murrow* at an arbitration held under an order of the court of common sessions of this place. It appeared, that, though Mr. *Carr* had on this, as well perhaps as on former occasions, most to say, yet he had not the best of the argument, and, fearing that he would be professionally foiled, he had instant and insidious recourse to blows, which were administered with no ordinary violence or treachery. Mr. *Murrow*, being very inferior in point of corporeal powers, urged Mr. *Carr* to desist, at the same time declaring, that, upon equal terms, he had no personal fear of him; but that he felt the indignity and degradation of opposing himself in such a low and brutal manner, or indeed in any manner, to a person whom he could not consider, either from his education or habits, entitled to his respect or worthy of his notice; that he would not keep a boy in his office capable of writing such stuff, or publishing to the world with the sanction of his name, a work destitute of every thing that could mark the professional man or the man of education. Mr. *Carr's* violent and instinctive abhorrence of the fallacious ideas of modern honour was clearly evinced by his own witness Mr. *Thomas Hanley*, who proved, that Mr. *Carr* had been repeatedly called and always considered a coward, in fact that he had heard Mr. *Stanistreet* make mention of his cowardice; here Mr. *Carr* started from his seat, seemingly with the kindled fire and valour of a *Nelson*, and addressing himself to

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Mr. *Stanistreet* an advocate for the prosecution: "What Sir?—did you, Sir—I say, Sir—did you, Sir, say, Sir, that I, Sir—was a—a—a—coward, eh!—" "Sir," replied Mr. *Stanistreet*, with the utmost composure, "we had better speak of this elsewhere."—"Oh! oh! oh!" retorted Mr. *Carr* with sweet and softened accents, "we had better say nothing about it, either here or elsewhere." This suggestion extorted from Mr. *Stanistreet* a look of contempt, which we shall leave to the painters to describe, the art of printing is unequal to it. At this moment Mr. *Carr's* agitation became visible, at least we thought so, and for the first time in our lives we saw, or suspected, a suffusion. Apparently aware of the approaching issue of the trial, and almost on the instant of being found guilty by a jury of his country, he bustled out of court; reduced to a condition in which ordinary meanness or brutality might be expected to excite some little compassion, he was pursued out of court by the hisses of several of the attending spectators. The feelings of disgust and indignation triumphed over the decorum of the court, and for the moment even "order," was not called. It is painful to record any thing, which is so foul and brutal as to defile the character of human nature, but we consider the full blown honors of our hero ripe for publication, and to withhold such an example would be a sin against society. Though it clearly appeared from the testimony of every person that was in the room where the arbitration was held, (except Mr. *Carr*) that no violence was used by Mr. *Murrow*, yet, reader, hear with horror, a violent assault was sworn against him, by Mr. *Carr*, and a bill of course found by the grand jury. When Mr. *Murrow's* trial came on, no witness appeared against him, and though Mr. *Carr*, in his exculpatory address to the jury, expressly mentioned and urged with marked and studied force the fact of a bill having been found against Mr. *Murrow* for a

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violent assault upon him, yet Mr. *Carr's* professional associate, said it was not his (*Carr's*) intention to proceed against Mr. *Murrow!!!* Some reference was made to a former publication of Mr. *Carr's*, the grammatical ignorance and absurdity of which Mr. *Murrow* had offered to point out for the author's amusement and emendation: this was proposed as a reply or rather as a punishment, for some very insolent and unfounded language used by Mr. *Carr*. The imputation as to Mr. *Carr's* ignorance of the common rules of grammar, was not opposed but urged as a ground of irritation; and indeed Mr. *Parr*, counsel for the prosecution, stated that an assault committed under circumstances of great provocation should be considered by the jury, and that the infirmities of human nature, were not to be confounded with the gross and senseless ferocity of a brute. Mr. *Parr*, with great humanity, seemed willing to acknowledge Mr. *Carr's* insanity, but the jury, having their attention directed probably to some other than the Lunatic Asylum, instantly pronounced him guilty, to the great satisfaction of a crowded court. The *Billingsgate* language that was used we have omitted, unwilling to stain our columns with such pollution; besides it could be no novelty to a great majority of our numerous readers, who have themselves often heard the accomplished and erudite Mr. *Carr* with astonishment, if not with delight or admiration."

To this the *defendant* pleaded the general issue. And also, "that, at the general quarter sessions of the peace, holden in and for the borough of *Liverpool*, next before the composing, writing, printing and publishing, the said supposed libels, to wit on the 23d day of *April* in the year of our lord, 1805, a prosecution was brought forwards against the said *Robert Carr* for an assault upon the said *Thomas Murrow*, and that

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he said assault was stated by the counsel, for the said *Thomas Murrow* to have been a savage, unprovoked and brutal attack upon the said *Thomas Murrow*, and hat in the opening the case it was stated, and afterwards clearly and fully established, by evidence, that he said *Robert* did wantonly and savagely attack the said *Thomas Murrow*, at an arbitration held by virtue of an order of the court of common sessions of the said borough. And it appeared that the said *Robert* at the said arbitration, in disputing professionally, as an attorney, had recourse to blows, which were administered with no ordinary violence or treachery; that the said *Thomas Murrow* being inferior in personal strength to the said *Robert* urged him to desist and, at the same time, made such declarations as in the said supposed libels are in that behalf set forth. And the said *William* further says, that in the course of the trial of the said *Robert* for the said assault, one *Thomas Hanley* was produced as a witness on behalf of the said *Robert*, and that the said *Thomas Hanley* then and there proved, that the said *Robert* had been repeatedly called and always considered a coward, and that he had heard Mr. *Stanistreet* make mention of his cowardice; and that such words and conversation as are in the said supposed libels in this behalf mentioned, did thereupon take place between the said *Robert* and the said Mr. *Stanistreet*. And that the said *Robert* did, almost on the instant of being pronounced guilty by the jury, go out of court, and was pursued by the hisses of several of the attendant spectators who were not for the moment called to order by the court, and the said *William* further says, that though it clearly appeared by the testimony of every person that was in the room, where the said arbitration was held, except the said *Robert*, that no violence was used by the said *Thomas Murrow*; nevertheless it appears that a violent assault had been sworn against the said *Thomas Murrow* by the said *Robert*, and that a bill of indictment

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had been found by the grand jury, upon the evidence of the said *Robert* at the preceding sessions, for an assault upon the said *Robert*, and the said *William* further says, that, when the trial of the said *Thomas Murrow* came on, no witness appeared against him, and although the said *Robert* in his exculpatory address to the jury, expressly mentioned and urged the fact of a bill having been found against the said *Thomas Murrow*, for a violent assault upon him the said *Robert*, yet the counsel of the said *Robert* in the said supposed libels called his professional associate, said it was not the intention of the said *Robert* to proceed against the said *Thomas Murrow*; and the said *William* further says, that some reference was made to a former publication of the said *Robert*, the grammatical ignorance and absurdity of which the said *Thomas Murrow*, had offered to point out for the author's amusement or emendation. That this was proposed as a reply or rather as a punishment, for some very insolent and confounded language used by the said *Robert*. That the imputation of the said *Robert*'s ignorance of the common rules of grammar, was not opposed but urged as a ground of irritation, and that the said Mr. *Parr* in the said supposed libels mentioned, as counsel for the prosecution did then and there make such statements and observations as are in the said supposed libels in that behalf mentioned. And the said *William* further says, that the jury who tried the said *Robert* did pronounce the said *Robert* guilty of the said assault upon the said *Thomas Murrow*, in manner as in the said supposed libels is mentioned, and that the supposed libels do contain a just and faithful account of the trial of the said *Robert* for the said assault, and of the proceedings thereupon, wherefore he the said *William*, did print and publish the said supposed libels, as he lawfully might for the cause aforesaid, and this he is ready to verify, &c.

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He also pleaded, as to the printing and publishing such parts of the said several supposed libels, as purport to contain an account or statement of the trial of the said *Robert*, at the borough sessions of *Liverpool* aforesaid, for an assault upon the said *Thomas Murrow*, and of the trial of the said *Thomas Murrow*, at the same sessions for an assault upon the said *Robert*, and of the facts, circumstances, and statements which occurred, took place, and were made, respectively, upon the said trials; that, before the printing and publishing of the said supposed libels, or any of them, to wit, on *Wednesday* the 23d day of *April*, in the year aforesaid, at *Liverpool* aforesaid, in the county aforesaid, at the general quarter sessions of the peace, held in and for the said borough of *Liverpool*, the said *Robert* was tried and found guilty upon a certain indictment, there depending in the said court, of an assault upon the said *Thomas Murrow*; and the said *Thomas Murrow* was tried and acquitted, upon a certain indictment therein also depending against him, for an assault upon the said *Robert*; and that the said parts of the said several supposed libels, in the introductory part of this plea mentioned, contain a just and faithful account of the said last mentioned trials, and of the facts, circumstances, and statements, which respectively occurred, took place, and was made thereupon; wherefore the said *William* did print and publish the said parts of the said supposed libels, in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, wherefore he prays judgment, if the said *Robert*, ought to have or maintain his action aforesaid, thereof against him. And for further plea as to the printing and publishing such parts of the said several supposed libels, as relate to the finding of a bill by the grand jury, against the said *Thomas Murrow* for an assault upon the said *Robert*, upon the oath of the said *Robert*, the said

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William, by leave of the court here for this purpose, first had and obtained according to the form of the statute, in that case made and provided, says, that the said *Robert* ought not to have or maintain his aforesaid action thereof, against him in that behalf, because he says that, before the printing and publishing of the said supposed libels or any of them, to wit, on the same day and year last mentioned at *Liverpool* aforesaid, in the county aforesaid, the said *Robert* was tried at the general quarter sessions of the peace, then held in and for the said borough of *Liverpool*, upon an indictment therein depending against him, for an assault upon the said *Thomas Murrow*, at a certain arbitration, before that time held under an order of the court of common sessions in that place. And the said *William* further says, that although at the trial last aforesaid, it clearly appeared from the testimony of every person that was in the room where the said arbitration was held, except the said *Robert*, that no violence was used by the said *Thomas Murrow*, yet true it is that a violent assault had been sworn against the said *Thomas Murrow*, by the said *Robert* before a grand jury, at the preceding quarter sessions in and for the borough aforesaid, and that a bill of indictment had been in consequence thereof found by the said grand jury, against the said *Thomas Murrow* for an assault upon the said *Robert* as in the said supposed libel is mentioned, wherefore the said *William* did print and publish the said parts of the said several supposed libels, in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, wherefore, &c.

To the second plea, the *plaintiff* demurred, generally; and to the third also demurred, stating for cause, that it does not appear in and by the introduction, in and by the said third plea, nor can it in any manner be

ollected therefrom, what the said plea means to justify; that, if it goes to the printing and publishing of he whole of the said several libels in the said declaration mentioned, the said plea is altogether bad and efective, and that if it only goes to parts of the said ibels, it is not expressed with sufficient certainty what parts the *defendant* means to justify, and that it is altogether impossible to divide and separate the said several parts of the said libels in the declaration mentioned, in manner and form as is attempted to be done by the said third plea of the said *defendant*; and for that it is impossible to take any precise or certain issue to the said plea; and to the last plea the *plaintiff* demurred generally, and stating for cause, that the said last plea does not express with any degree of certainty, the parts of the said libels in the said declaration mentioned, which the said *defendant* means to justify, and that it is altogether impossible to divide and separate the said several parts of the said libels in the declaration mentioned, in manner and form as is attempted to be done by the said last plea of the said *defendant*; and for that it is impossible to take any precise or certain issue to the said plea; and also for that the said last plea is loose and uncertain, inasmuch as it contains the conclusions and surmises of the *defendant* himself, and not the averments of facts.

CLARKE, *James*. "This is a question whether a publication, pretending to be an account of judicial proceedings, be a libel, as to those parts which are justified, or whether the justification is good. In deciding it, the court will not be called upon to say, that if a fair account be given of the proceedings of a court of justice, for the information of the public, it is a libel. The first count charges the libel to be printed and published of the *plaintiff*, concerning his character as a clerk of the court of requests, and charging him with perjury; all that the justification states is, that he

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committed an assault on Mr. *M.* which can in fact have no reference to the libel entitled Judicial Delinquency, or to the *plaintiff*'s having done anything wrong in the court of requests; nor has the *defendant* any right, because the *plaintiff* has committed an assault, to bring him before the public for something else. On the contrary, the justification ought to have answered the charge, for publishing the libel entitled Judicial Delinquency. This charge is, that it contains an imputation of perjury; which is not capable of being justified, and which is not here confessed. The *plaintiff*'s conduct is in the libel charged to be such as to defile human nature, and yet, when the libel is justified, it appears, by the pleadings, only to have been an attempt to prove an assault by the testimony of some persons, which testimony being heard and being met by that of others, the verdict is given, not guilty. If the *defendant* would justify it as a report of legal proceedings, he ought to have stated those proceedings as they passed, and left it to others to draw their own conclusions. In *Jacob* v. *Southey*,* there was an action for imputing perjury to one, and the defence was that it was found by verdict that the *plaintiff* was perjured, but no judgment was entered; and whether the plea was good or not, was the question; and it was adjudged no plea, because there should have been a judgment. This, therefore, can be no justification, as to the charge of perjury. This objection goes in substance to the whole of the pleadings, upon general demurrer, that the matter justified is incapable of justification: and the justifications by no means cover the allegations in the libel."

LAWRENCE, J. "On these pleadings, it may be

* *Brownlow*, 11.

that he did not publish any thing but what he admits and justifies."

CLARKE. "This is the first time a libel was ever so divided as in the second plea; and we cannot take issue upon this plea; for how can we divide those parts of the plea and the libel, which he calls facts, from those which are not? If there are parts of the libel which may be justified, though others cannot, he ought himself to separate the bad from the good, specifically. Here it is only stated indefinitely, 'as to such parts of the libel as purport to contain a statement of facts;' but he ought to have selected those parts which he means to justify; and, in actions for slander, you justify the words precisely as they are laid. To do otherwise would be to throw too great a burthen upon the *plaintiff*. The last plea only states, that two witnesses spoke one way, and Mr. *Carr* another, and the justification must now stand wholly upon that." He concluded "that the pleas were bad, first, upon the ground, that the matter attempted to be justified could not be justified; and secondly, that the pleas were informal, in not sufficiently separating the matter attempted to be justified, from that which was to be denied merely by the plea of not guilty."

SCARLETT, *contrà*. "The first plea is the general issue; the second, a justification as to the whole, and the 3d and 4th, a justification as to parts; as to the second plea, two objections have been made, one of which is that the declaration charges the *defendant* with publishing a libel, intending to charge something upon him as to his being a clerk of the court of requests: now the *defendant* is only bound to admit something in his pleadings which he will justify, but he is not bound to put the same construction upon the words which the *plaintiff* has put. The writer only means, that a person who held the office of judge of the court did certain facts which he there states.

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He admits only and justifies by these pleas the facts. 'Judicial Delinquency,' for instance, which is the title to the paper, contains no fact; and therefore cannot be justified. All that in pleading can be done is to state the facts, and to say that they are true; the jury is to draw the inference what the libel means to impute; and the *plaintiff* might have taken issue, if it is said that the *defendant* did not mean to give a fair account of the proceedings in the court of justice. The true question is, however, whether the facts stated in the libel are stated in the plea: no matter what the meaning of them is and justified? to publish accounts of proceedings in a court of justice cannot be a libel. In this court there was an information for a libel against one *Wright*,* who published a statement of proceedings in the House of Commons, and it was held no libel. Mr. *Justice* LAWRENCE, in that case, said, "it has been contended that the publication of the proceedings of courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield* v. *the Bishop of Chichester* had been cited. But on examining that case, it appears that the charge there was, that the *plaintiff* had not published a true account. Therefore, I do not think, that that case establishes the proposition to support which it was cited; and I am not aware of any authority that does support it. The proceedings of courts of justice are daily published, some of which highly reflect on individuals, but I do not know that any information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts, but they are printed for the information of the public. Not many years ago an action was brought

* 8 *Term Rep.* 293.

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in the court of common pleas by Mr. *Currie* v. *Walter*, proprietor of 'the Times,' for publishing a libel in the paper of the 'Times,' which supposed libel consisting in merely stating a speech made by a counsel in this court on a motion for leave to file a criminal information against Mr. *Currie*, Lord *C. J. Eyre*, who tried the cause, ruled, that this was not a libel nor the subject of an action, it being a true account of what had passed in this court; and in this opinion the court of common pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted, whether or not the *defendant* could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public, that the proceedings of courts of justice should be universally known. The general advantage to the country in having those proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of the proceedings."

Lord ELLENBOROUGH, C. J. "That must be taken with some limitation. Many things are necessary to be stated in a court of justice, which might affect the feelings of families, and which it would be highly improper to permit to be stated to the public. I do not mean to put strict restraints upon the publication of accounts of trials; but if it be done for the purpose of prejudicing an individual, it may yet be a libel. It is very difficult to draw the line between what is a fair publication and what is not."

SCARLETT. "In *Astley* v. *Young*,* it is said if the

* 2 *Burr.* 807.

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matter is justified, the manner is immaterial; then these facts may be easily collected from the mere observations, but it does not follow that the meaning of them is such as has been stated in the declaration. This does not charge the *plaintiff* with perjury."

Lord ELLENBOROUGH, C. J. "Do you mean to contend, that the justification does not admit the inuendoes?"

SCARLETT. "If a man charge another to have asserted, that he had sworn falsely, meaning thereby that he had committed perjury, the *defendant* may shew that the *plaintiff* swore falsely, but not admit that he stated him to have committed perjury."

Lord ELLENBOROUGH, C. J. "You must admit the sense, as stated in the inuendoes. You must either admit that sense, or must give another sense."

LE BLANC, J. (*Currie* v. *Walter*,* being cited.) "That was a paper without observations or any insinuation. You can only justify as to the facts; but, if the facts are found for you, will it acquit you of the libel? Will it acquit you of publishing proceedings in a court, with direct inference, and imputations on the character of various persons?"

LAWRENCE, J. "Here, besides, you state the act which you charge to be a perjury; and, if true, as you state it, there must be perjury. That therefore, is not like the case of charging a man with stealing a tree, which being affixed to the freehold and part of it, cannot be the subject of a felonious taking."

SCARLETT, abandoning the distinction as to the difference between the meaning charged by the de-

* 1 *Bos. and P.* 525.

claration, and that which he insisted was the meaning of the paper, endeavoured to defend the pleas upon the point of form, and to shew that the facts might be separated from the observations in the manner here done, and cited *Dallison* 33.

Lord ELLENBOROUGH, C. J. "In order to avoid prolixity, you need not, in your plea, repeat the words; but may ascertain them by reference. Thus, for instance, you might have said, "as to all the matter contained between such a word and such a word, and as to all the matter from the words—to the words——." But even if they could be separated in this case by any industry, I mean the observations from the facts, how can they be so by this general mode of reference. It begins '*Liverpool quarter sessions*,' and appears to be throughout, as if it was intended to be understood as a narrative of facts. But, as to saying that it contains no libellous matter, it is clearly impossible to contend for that position. Had it been a temperate account of facts, it might have begun by stating that a most interesting trial had occurred. But is there in the words "Judicial Delinquence;" nothing of a libellous nature; and how is this to be separated? The libel is mixed with the narrative, so that we cannot separate it. We may think one part fact, and the judge at *nisi prius* may think another part to be intended for a statement of fact. But, there ought to be such precision, that it might be distinctly known to the court and jury, what is to be the proper province of both. If by reference it can be made clear, it may be so; as if you had said, "perhaps, as to so much as purports to impute to him the crime of perjury." But I would not be understood, that this is a decision which will justify the setting out of all the libel in the plea; for that would lead to a great length of pleading, which is quite unnecessary." (Upon *Scarlett* applying for leave

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to amend). "If parties choose to take upon themselves to publish the proceedings of courts of justice, and either do not justify, or do not justify in the best manner which they can, the court will not help them."

JUDGMENT for the PLAINTIFF.

Lord CLANRICARD *against* STOKES.—*June* 13*th*.

Pleading. Game. Stat. 5. Ann, c 14. 2 Geo. III. c. 19.

Declaration in debt that the defendant *kept a snare for killing hares,* contra formam statuti, *whereby and by* force *of the* statute, *an action hath accrued to demand* 5*l.*, *held good, in arrest of judgment; the offence being created by one statute, and the action for the whole penalty to the informer being given by several subsequent statutes incorporated in the statute* 2 Geo. III. c. 19. *The first clause refers to the first statute, the second to the last.*

Qu. Whether vigore statuti *may be omitted* in such a declaration.

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THE *plaintiff* declared, in debt, for a penalty upon a statute, that the *defendant* did keep a snare for the destruction of the game, the said snare being then and there an engine to kill and destroy the game, contrary to the form of the *statute* in that case made and provided, the said *defendant* not being in any wise qualified or having any lawful authority so to do; by reason whereof, and by force of the *statute*, in such case made and provided, an action hath accrued to the said *plaintiff* to demand and have of *defendant* 5l. &c." The *defendant* being found guilty, it was moved in arrest of judgment, that it should have been contrary to the form of the *statutes*, in the plural number, and whereby and by force of the *statutes*; for that the offence is created by one or more statutes, and the remedy to the informer is given by another, if not by two; viz. the offencee is created by statute 5 *Ann*, c. 14, s. 4, that statute is constructed by a subsequent

statute, and gives half the penalty, to be recovered by summary proceeding, to the informer; by statute 8 *Geo. I.* c. 19, an action is given to the common informer to recover half the penalty within a limited time, and lastly the statute 2 *Geo. III.* c. 19, s. 5, gives the whole penalty to the informer; so that there are two statutes by which the offence is created and two which enable the party to bring his action.*

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* 5 *Ann.* c 14, s. 4, if any person not qualified by the laws of this realm shall keep or use any greyhounds, setting dogs, hayes, durokes, tunnels, – ——, or any other engines to kill and destroy the game, and shall be thereof convicted upon the oath of one or two credible witnesses, by the justice or justices of the peace where such offence is committed, the person or persons so convicted shall forfeit the sum of 5l. one half to be paid to the informer, and the other half to the poor of the parish. This act shall remain in force for the space of three years, from 1st of *May*, 1707, to the end of the next session of parliament. The 9 *Ann.* c. 25, made the 5 *Ann.* c. 14, perpetual, subject nevertheless to the additions or alterations after-mentioned, viz. whereas by the former act a lord of a manor might appoint more than one gamekeeper for one manor: it is enacted he shall appoint only one for one manor. 8 *Geo. I.* c. 19, entitled an act for the better recovery of penalties inflicted upon persons who destroy game. For rendering more effectual the laws now in being for the better preservation of the game, be it enacted, that, wherever any person shall for any offence to be hereafter committed against any law now in being for the better preservation of game be liable or subject to pay any pecuniary penalty or sum of money upon conviction before a justice of the peace, It shall be lawful for any other person whomsoever, either to proceed to recover the said penalty, by information and conviction before a justice of the peace, or to sue for the same by action of debt. Sect. 2. The action is to be brought before the end of the next term after the said offence. 26 *Geo. II.* c. 2, recites the last act, and enacts that all ac-

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CLANRICARD versus STOKES.

BURROUGH and GASELEE shewed cause. "The offence and the penalty are created by one statute, namely, by the statute 5 *Ann.* c. 14, although the mode of recovery is altered by the subsequent statutes; in that case it is not necessary to allege the offence to be *contra formam statutorum*; but, where the offence is created by one statute, and the penalty is given by another statute, there, being so much connected together, in order to enable the *plaintiff* to maintain his action, the offence must be laid *contra formam statutorum*. If an act is made forbidding one to do such a thing and another act gives the penalty, the declaration should conclude *contra formam statutorum*, but where the statute is only revived it is otherwise, *Stradling* v. *Morgan*:* so in *Rex* v. *West*,† cited in *Lee* v. *Clarke*.‡ In *Broughton* v. *Moore*,§ by the 1 *Eliz.* c. 2, every one is to go to his own church, upon pain of 12d. to be levied by the churchwardens; then the 23d *Eliz.* c. 1, gives a further penalty of 20l. per month; and the 29th *Eliz.* c. 6, gives the third part

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tions brought by virtue of that act shall and may be brought before the end of the second term after the said offence. 2 *Geo. III.* c. 20, recites 8 *Geo. I.* c. 19, the part above transcribed, and that, by several acts, a moiety of the penalty goes to the poor of the parish where the offence committed, by reason whereof the inhabitants have been disallowed to give evidence; and whereas suits by action of debt or case, bill, plaint or information are often attended with great costs, be it enacted that, after the passing of this act, it shall be lawful for any person to sue for the whole of the penalties to his own use by action of debt or on the case, bill, plaint or information in any of his majesty's courts of record. S. 6. No action to be brought but within the 6 months.

* *Pl.* 206. † *Owen*, 135. ‡ 2 *East.* 339. § *Cro. Jac.* 142.

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CLARINGBULL *versus* STOKES.

of the forfeiture to the poor, for all who offend against that statute: this must necessarily be *contra formam statutorum*; for it is in truth *pro tanto*, a repeal of the penalty of the first act.* In *Dingly* v. *Moore*,† there was an information for buying worsted yarn, within the county of *Norfolk*, not being a weaver, on the 33 *H. VIII.* c. 16, and the 1 *Edw. VI.* c. 6, the latter whereof made the former perpetual; and it was laid *contra formam statuti*, 33 *H. VIII.* c. 16, but there was this variance between the statutes; viz. by the statute 33 *H. VIII.* c. 16, no person from thenceforth shall bring within the city of *Norwich* worsted yarn, but only weavers, upon a penalty, half to the king and half to the informer; then the latter statute instead of barely continuing the first, introduces new matter, and therefore it was necessary to say *contra formam statutorum*. Here the 5 *Ann* creates the offence and gives a certain penalty to be recovered summarily; a subsequent statute requires the action to be brought within the next term, and another within six months; but the 2 *Geo. III.* contains all that is necessary to give the action, in its present form, to the *plaintiff*. It gives in terms an action of debt to the informer lawfully to sue for the penalty to his own use. The court need, therefore, in order to found their authority, only to resort to the 5 *Ann* and the statute 2 *Geo. III.* The 5th of *Ann.* was a temporary statute, which was never suffered to expire, and there was formerly a distinction taken as to this point between acts which had expired, and those which had not; but, by the later cases, this distinction is denied, and by the 9 *Ann*, c. 25, the 5 *Ann*, c. 14, is made perpetual. The statute 9 *Ann*, c. 25, makes no alteration as to this particular offence, but only as to the appointment of

* *Qu.* † *Cro. Eliz.* 750.

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GEARINGARD versus STOKES.

a game-keeper. Yet though the second act should make some alteration, *contra formam statuti*, would be sufficient. Then the 12 *Geo. II.* in order to render more effectual all the laws for preservation of game, instead of making the penalty recoverable before the justices, directs that an action shall be brought for the whole penalty, by any person, for the informer and the poor of the parish, if brought within the next term. The next statute 22d *Geo. II.* c. 2, extends the time so that it may be brought before the end of the second term, and the last act 2 *Geo. III.* c. 2, recites the statute of *Ann*, and enables the informer to sue for the whole penalty by action of debt, bill, plaint, &c.; and by s. 6, no action shall be brought but within six months after the offence shall be committed. Here then are two statutes only to be referred to, and the declaration states 'contrary to the form of the statute,' which refers to the statute of *Ann*, and then follows, 'whereby and by force of the statute an action hath accrued,' which latter words must refer to the statute 2 *Geo. III.* But there are many precedents in the books wherein *vigore statuti* is wholly omitted, and it is sufficient to conclude contrary to the form of the statute, *per quod actio accrevit*, and therefore the allegation may, after verdict, be rejected as surplusage.* *Barnby* v. *Mandyke*,† *Bennet* v. *Tatbois*.‡ And if it is said there is any uncertainty which statute is meant, now after verdict that cannot be alleged in arrest of judgment, and the court are bound to take notice of the statute law." They observed that in *Lee* v. *Clarke*, it was held to be unnecessary to notice the statutes which create the limitation as to time. They contended also that, if it was necessary to look to two

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* *Lutw.* 132. † *Lutw.* 208. *Lilly's Entries*, 175.
‡ 1 *Lord Raym.* 145.

statutes for the remedy, under the words by force of the statute, those words from the cases above cited may be omitted after verdict, as surplusage, and it would be sufficient to say *contra formam statuti.*

JEKYLL and DAMPIER, *contrà.* "To a common understanding it would appear, from this declaration that this penalty accrued by only one statute, and that there was but one statute upon the subject; but, in fact, there are three or four, two of the statutes being incorporated, and the action acrues by virtue of all these statutes. In *Lee* v. *Clarke*, Lord ELLENBOROUGH says, "though I cannot so well dispose of the first error, that the offence for which the penalty is given is not alledged to be against the form of the statute, it being clear that this was no offence at common law and only made so by the statute. Such an averment has always been considered necessary; otherwise the cases alluded to which turned on the distinction between such averments in the singular or plural number according as the offence arose out of one or more statutes could never have arisen, for the answer would have been that either was unnecessary. The only authority which seems to bear the other way is that referred to in *Salkeld:* but that was not a penal action. It does not distinctly appear, but that the subject matter might have been a ground for an action at common law. But at most it is an anomalous case, against the current of authorities. Also as to the second error it might admit of considerable question whether it should not have been laid against the form of the statutes where the right of action is given by more than one statute. What was said by *Warburton* J. in *Owen*, 135, is an express authority in point to this purpose. "If a statute doth prohibit a thing and another statute giveth a penalty; there upon an information upon the penalty, both statutes ought to

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be recited, and to conclude *contra formam statutorum*, but where the statute is only revived, it is otherwise."

There is no analogy between this case, and the cases cited in the old books, upon the statutes of *recusancy*. Here the same statute which creates the offence gives part only of the penalty to the common informer, and does not give the remedy; and according to *Broughton* v. *Moore*,* it would be bad if it referred only to one statute."

Lord ELLENBOROUGH, C. J. "The analogy of that case to the present depends upon whether *contra formam statuti*, was followed by *per quod, et vigore statuti*, as it is here."

DAMPIER, "As to the argument that "by force of the statute," is surplusage, the same reason which requires that you should allege the fact *contra formam statuti*, requires that you should state also the action to accrue *vigore statuti*: then this cannot be right, for the remedy is given by force of several statutes. If the court is referred to the statute of the 5th of *Anne*, that does not give the penalty to be recovered as it is demanded here."

Lord ELLENBOROUGH, C. J. "Is there any case which requires you in the declaration, to give notice how or by what statutes, whether by one or more, the action is given; if you are referred to the statute which makes the offence? For I admit, that you must state it to be a statutable offence."

DAMPIER. "If you were to say as this declaration is in effect, when by force of the statute is omitted, that the *defendant* kept a snare contrary to the statute of the 5th of *Anne*, whereby an action hath accrued

* *Cro. Jac.* 142.

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BLANKIGARD *versus* STOKES.

to demand 5l. it would, upon reference to that statute, not be found to be so; for the common informer is not entitled, by that act, to the 5l. Then, if by force of the statute stands, there is no one statute which gives the action."

Lord ELLENBOROUGH, C. J. "Need any thing more be stated than the statute 2 *Geo. III.* c. 19.? For that statute recites the statute 5 *Anne*, and also the statute of *Geo. I.* Then, if two statutes are required to found the action, we have the 5th of *Anne*, for the creation of the offence, and the 2 *Geo. III.* for the action. But, I think, the whole is given by the 2 *Geo. III.* c. 19, and if the other had been repealed this would have been sufficient; for there is a substantive provision in that act. (*Upon referring to the statute.*) It recites the statute 8 *Geo. I.* but not the statute 5 *Anne*, c. 14. Then, if it is necessary to refer to two statutes, we have a reference to two statutes."

RULE DISCHARGED.

STILL *against* WALL.—June 17th.

Parol order of commitment by justice, until the effect of a warrant of distress for a penalty be known, held good on statute 13 Geo. *III. c.* 80, *for selling goods on a* Sunday.

Trespass. Justice. Commitment. Stat. 13 Geo. III. c. 80.

STILL *versus* WALL.

IN an action of trespass for false imprisonment tried before HEATH, J. at *Maidstone*, an information was preferred against the *plaintiff*, before a magistrate, upon the statute 13 *Geo. III.* c. 80, for having sold goods on a *Sunday*, and the *plaintiff* was convicted in a penalty of 40s. The justice then ordered the *defendant Walls*, who was a constable, verbally, to keep the *plaintiff* in custody until the effect of a warrant of distress, which was issued for the penalty should be known. The statute enacts, that if the party shall be convicted, the penalty shall be forthwith paid; and

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STEEL versus WALL.

in case of neglect, the justice by his warrant shall cause the same to be levied by distress and sale; and it shall be lawful for the said justice to order the *defendant* to be kept in safe custody till it shall appear that the same is paid. Upon the distress being sent, the *plaintiff* brought the penalty and was discharged. Upon this evidence there was a verdict for the *plaintiff* damages 40s.

A rule was obtained by *Bayley*, Serjt. to shew cause why the nonsuit should not be set aside, and now

GARROW and ESPINASSE, for the *plaintiff* argued that if a constable be permitted to take a person into custody, upon the mere parol authority of a magistrate, the act which requires the *plaintiff* to demand the warrant one month before the commencement of the suit will be of no avail. That, in all these cases, the constable ought to have a warrant to produce.

LAWRENCE, J. "Suppose a magistrate sees a breach of the peace committed, cannot he order a man into custody?"

Lord ELLENBOROUGH, C. J. "If there is any portion of time for which a justice can commit, as for instance, while he is making out a warrant, it must empower him to commit absolutely, by parol. We order the commitment of offenders, by parol, though a formal order is afterwards drawn out. In *Hawkins* lib. 2, c. 16, s. 13, it is said a warrant must be in writing under the hand and seal by which it is made, but here as to the distress, the words of the act of parliament direct, particularly, that it shall be in writing; but in the case of commitment it is by order only."

RULE for a NONSUIT ABSOLUTE.

1806.

CRAWFORD *against* OXLEY.—18th June.

Practice. Bail.

Where, by mistake, notice of bail was given as put in at the chambers of one judge, where it was put in before another judge, and the plaintiff *not finding the entry of the bail, proceeded upon the bail bond, and, upon serving process, the principal rendered, and the bail offered to pay costs, the proceedings were afterwards set aside, upon payment of costs up to the first offer to pay costs.*

RULE to shew cause, why the proceedings on the bail bond should not be set aside, on payment of costs. The writ was returnable on the 19th of *May;* Bail was put in on the 23d, and on that same day notice was given of putting in bail; but by mistake, the notice stated that the bail were put in at the chambers of Mr. Justice LE BLANC, whereas in fact they were taken before Mr. Justice LAWRENCE. On *Saturday* the 7th of *June*, one of the bail was served with process upon the bail bond, and, the mistake being discovered, a correct notice was served, and, on the same day, the principal was surrendered and they offered to pay costs on the bail bond.

CRAWFORD *versus* OXLEY.

For the *plaintiff*, it was contended, that he had been misled by the notice.

ABBOTT and WIGLEY, were the counsel.

LAWRENCE, J. "When you were told of the mistake you might have enquired, or you might have searched further; you look to the place to which the bad notice directs you, without endeavouring to discover whether there may not be a mistake, and will not look further."

RULE ABSOLUTE upon payment of costs of the assignment of the bail bond, as well as the costs of the writ; the costs up to the time of the offer to pay costs.

1806.

COLBY *against* GIBSON.—18th June.

Practice. Mortgage. Covenant.

A mortgagee, having filed a bill of foreclosure and having proceeded to execution, in ejectment and being in possession of the rents and profits of 200*l. a year, under an ejectment, and having brought covenant for the mortgage money and obtained execution; the court refused to discharge the defendant out of execution: for the* plaintiff *has a right to his remedy on all his securities.*

COLBY *versus* GIBSON.

MOTION for a rule to shew cause, why the *defendant* should not be discharged out of execution, in an action by a mortgagee on a covenant for payment of the mortgage money. There were three remedies taken; first a bill of foreclosure; secondly, an ejectment; and thirdly, an action for the mortgage money. The *plaintiff* had obtained a writ of possession, and was in the receipt of the rents and profits of 200*l.* a year, at the time of making the motion, and there was a *ca. sa.* in execution, for the whole of the mortgage money, at the same time.

LAWES, for the *defendant* contended, that the judgment in one action was a satisfaction of the whole; and that, after the *elegit* issued, as that was a continuing judgment and satisfaction, there could be nothing taken further. He said the *plaintiff* had got the whole estate under the ejectment.

GROSE, J. "I remember this very case, a mortgagee took a bond and a covenant, brought an ejectment, put the bond and covenant in suit, and proceeded to execution in all. I moved to have the man discharged as to some, after so many securities taken; but it was held, that the party had a right to all. The *ca. sa.* is only a satisfaction where the judgment is the same."

Lord ELLENBOROUGH, C. J. "The *elegit* being a

continuing satisfaction is only to be urged where the judgment is the same. Here the securities are different." 1806. COLBY versus GIBSON.

RULE NISI REFUSED.

DOE on the demise of Lord BRADFORD *against* WATKINS and HADKINSON.—20th June.

Where a tenant entered on meadow land at December, *on pasture at* March, *and the houses, consisting of mills, and other buildings for a manufactory, at the* 1st *of* May, *and was to pay rent at* Pentecost; *held that the day of entering on the manufactory, which was the principal day of entry, and not the rent day.* Ejectment. Notice to quit.

IN ejectment the *defendants*, in *September*, 1801, by virtue of a contract between them and one *John Glover*, entered into possession of the premises, and afterwards purchased the whole term and interest therein, from the assignees and mortgagees of *Glover* who became bankrupt in 1803. *Glover* himself derived his title under an agreement for a lease indented and sealed, bearing date the 1st day of *January*, 1791, and made between *William Hobson* the agent to, and on the behalf of Sir *Henry Bridgman*, bart. since deceased (the father of the lessor of the *plaintiff* Lord *Bradford*,) of the one part, and the said *Glover* of the other part; whereby it was for the considerations therein-mentioned, agreed, that the said Sir *Henry* his heirs or assigns should, on or before the 1st day of *January*, 1792, upon the condition therein-mentioned, make and execute unto the said *Glover* his executors and administrators a lease of the messuages, tenements, lands, mills, waters, watercourses, and premises therein described (being the premises in question;) which lease was to be for the term of 35 years, to commence as to the meadow ground, from the 25th day Doe Dem. BRADFORD versus WATKINS.

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Doe dem. BRADFORD *versus* WATKINS.

of *December* then last, and as to the pasture ground (except the fields therein excepted) from the 25th day of *March* then next; and as to the said fields, (before excepted,) and the housing, mills, outhousing, and other buildings, and all the residue of the said premises, from the 1st day of *May*, then next; at and under the yearly rent of 250l. without any deduction; and to be paid and payable to the said Sir *Henry Bridgman* his heirs and assessors on the day of *Pentecost*, and the feast of St. *Martin* the bishop, in winter, yearly during the said term; and the first payment thereof to begin, and be made on the feast day of *Pentecost* then next. The premises were taken and fitted by *Glover* for the trades and businesses of bleaching and printing, and manufacturing oil of vitriol, in which businesses they had been used by him and the *defendants*, and for no other purpose. The day of the demise in the declarations was the 11th day of *June*, 1805, to hold from the 10th day of *June* then last past, and the time of the ouster was on the 12th day of *June*, 1805. The causes came on to be tried at the last Lent assizes for the county of *Lancaster* before *Chambre*, J. The *plaintiff* proved service of the notice to quit only on the *defendant Watkins*, the notice was dated on the 18th of *September*, 1804, but was not as it was proved, served until the 28th of that month. The *plaintiff* also proved payment of rent by the *defendants*.

An objection was taken at the trial and was afterwards mentioned on the motion for the rule *nisi* that the service on the *defendant Watkins* only, was insufficient. He lived on the premises; the *defendant Hadkinson* lived at *Liverpool:* but the objection was overruled at the trial. The notice to quit was as follows: 'take notice that you must quit and deliver to me or my order peaceable and quiet possession of the messuage, cottage, or dwelling house, hereditaments and premises, which you

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now hold under *Orlando*, Lord *Bradford*, of Great Lever in the county of *Lancaster*, at the expiration of the current year, for which you hold the said premises, at which time your term and interest of and in the said premises will expire. Dated this 18th day of *September*, in the year of our lord 1804."

At the trial the learned judge thought the holding was at the last of the three periods mentioned, namely the 1st of *May*; and said that it was very common to make the whole rent payable before the year expires. He alluded to a variety of usages in different countries, and seemed to consider it the same as a letting of an agricultural farm. He thought, however, that the previous entries could not be considered as mere privileges; because they were more than compensated for by the first half year's rent which was paid at *Pentecost*, that is, for a holding short of half a year. And according to his direction there was a verdict for the *plaintiff*.

PARK obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, which was now argued, and the whole question was as to the validity of the notice to quit, and consequently as to the commencement of the term. Doe d. *Spencer* v. *Strickland*,* was cited and it was contended that the notice to quit should be to quit as the tenant entered on each of the portions of the demised premises; or previous to the entry on the meadow land which was used chiefly for the purpose of bleaching. That there should be six months notice previous to all the days of entry, and that for want of it the notice was bad.

Lord ELLENBOROUGH, C. J. "In Doe d. *Spencer* v. *Strickland*, and the other cases it is laid down, that six months notice to quit previous to the substantial

* *East.* 2 *Smith's Rep.*

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time of entry is sufficient to determine a lease from year to year. What then is the substantial time of entry? This demise is for the purpose of carrying on a manufactory of whitstering printing, bleaching, and making oil of vitriol. The houses for the bleaching, then are the principal; and the entry to them is the 1st of *May*. That is the substantial part of the demise; almost every thing is ancillary to it. There is a liberty of entry or commencement as to the meadow ground upon the 25th of *December* a bye-gone day; a liberty of entering for the purpose of preparing it for the purposes of bleaching. If it is not an absolute entering from that day, all the rest of the days are without the six months, and it appears that all these are in the nature of liberties, to enter antecedent to the time of the substantial enjoyment. It is convenient, that there should be one period at which a notice to quit is to determine the whole, and there is nothing here to confine the notice to a succession of times of entering. There is nothing to induce us to say, that the notice should be half a year previous to all the times mentioned, or that it should extend to the whole year. That rule would only operate to produce the inconvenience of giving a notice at different times, and would be as if there were a different occupation of each under different demises. The rule laid down in *Doe* d. *Spencer* v. *Strickland*, that the day of payment of rent is the principal time of entry, is a good rule; but it is not interfered with in this case; for the substantial entry here is the 1st of *May*.

GROSE, J. "It is laid down in *Doe* d. *Spencer* v. *Strickland*, that the time for which notice is to be given is the substantial time of entry. What that is must depend upon what the premises are, and the particular nature of the demise. This is a demise of pasture, meadow, outhouses, and buildings; but the place

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for the manufacture was to be the place principally to be looked to. The entries are the 25th of *December*, 25th of *March*, and the 1st of *May*. The last is the most material, and six months notice before the 1st of *May* will be good. There are cases in which it is said, that the day of payment of rent is the substantial day of entry. I do not mean to interfere with the rule laid down in *Doe* d. *Spencer* v. *Strickland*, where that position is adopted; but that cannot be the case here, because *Pentecost* happens on one of the 25 different days in different years, and if that were the principal time of entry, the *defendant* might be turned out before he had occupied a whole year, the principal day of entry is the day before which the notice should be given. The 1st of *May* is that day: for the principal part of the lease applies to the manufactory which was entered upon on that day.

LAWRENCE, J. "The question is, whether this is reasonable notice? The rule is that there must be half a year's notice before the time of quitting, which must correspond with the substantial time of entry, although some part may be given up before the end of the term. The substantial part of the demise is, in this case, the manufactory; all the rest is ancillary."

LE BLANC, J. "In the case of *Doe* v. *Strickland*, the court fixed on the day of payment of rent, as the day for determining the lease. There the court only inferred, that the rent day was the day on which the principal part of the premises was entered upon. Here the principal, the manufactory, was entered upon on a day which was not the rent day. The reason for giving six month's notice is to allow the party time to get himself a farm. It is said in argument that the bleaching ground, the meadow is the material part; but it is clear, that could not be so; because the entry

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on that was at a time when the party was not in the possession of the houses or any place where he could carry on the manufactory."

RULE DISCHARGED.

ELIZABETH, HORN Executrix of JOHN HORN *against* WILLIAM HORN and RICHARD JACKSON.—*June* 13*th*.

Pleading. Annuity. 17 Geo. III. c. 26

In an action upon an annuity bond, where the defendant *pleads the statute, if it appear by the pleadings, that the consideration, is for relinquishing of business, and not a money consideration, and therefore, excepted by the statute, the* plaintiff *may demur, and need not be put to reply that the bond is not within the statute.*

HORN versus JACKSON.

DECLARATION, in debt, on bond for 3,630l. with the following condition for the payment by the *defendants William Horn* and *Richard Jackson*, or either of them their or either of their heirs, executors, or administrators, unto *John Horn*, his executors, administrators or assigns of 1,815l. with legal interest, to commence from the 1st day of *March* instant, on the 1st day of *September* next ensuing the date of the bond or obligation. And also upon a further bond for 5000l. with condition for the payment by the *defendant*, one of them, their, or one of their heirs, executors, administrators, &c. unto *John Horn*, his executors, administrators, or assigns, for and during the natural lives of him the said *John Horn*, and of *Elizabeth* his wife, and of the life of the survivor or longer liver of them one annuity or yearly sum of 600l. free from all taxes, &c. with other usual provisions. The *defendants* after oyer of the said bonds and conditions, pleaded *non est factum* to each, upon which issue was joined. And as to the first bond usury in the loan of 1,815l. from the 1st of *March* 1801, to *September* 1st

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1801, paying interest at 5l. per cent. for that time to be secured by bond, when in fact the money was not advanced till after the 20th day of *March*; that the obligee forebore and gave day of payment during that time, and in pursuance thereof, for securing the repayment thereof, the bond first mentioned was given, &c. The *defendants* also pleaded several pleas stating that *John Horn* deceased, was in partnership with them; and in consideration of releasing the business to them, and of the debts to be relinquished to them, which did not come into present payment, took the bonds for receiving payment of the value thereof, with interest, and so alledged, that the consideration was usurious. Amongst the rest was the following plea which serves more fully to explain the nature of the transaction: that before the making the said writing obligatory in the said first and second counts of the said declaration mentioned or either of them, to wit, on the 24th of *February*, 1801, the said *John Horn* and *Robert Horn* and the said *William Horn*, were co-partners together, (to wit) as distillers, and before the making the said writing obligatory or either of them (to wit) on 1st of *March* in the year 1801, said *Robert Horn* ceased to be a co-partner with said *John Horn* and *William Horn* (to wit) at *London*, &c. that before the making the said writing obligatory, or either of them (to wit) on the 20th of *March*, 1801, said *John Horn* was desirous of withdrawing himself from the aforesaid business of a distiller which he had theretofore carried on with the said *Robert Horn* and *William Horn* in order that the same business of distillers might be carried on by the said *William Horn* and *Richard Jackson*, in co-partnership together, upon such terms as were to be agreed upon in that behalf, (to wit) at *London*, &c. That before the making the said writings obligatory in the said declaration

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mentioned or either of them; to wit, on 29th *March* 1801, at *London*, &c. it was corruptly and against the form of the statute, &c. agreed by and between the said *John Horn* and the said *defendants* that the said *John Horn* should withdraw himself from the said business as from the 1st *March* then last past in favor of the said *William Horn* and the said *Richard Jackson*, and permit them to use, occupy, and enjoy a certain distil house, and certain other premises then and there specified in that behalf, and certain vats, stills, and utensils of trade therein and thereon, in consideration of an annuity or yearly sum of 600l. to be paid to him, the said *John Horne*, his executors, administrators, and assigns, for and during the lives of himself and *Elizabeth* his wife, and the life of the survivor or longest liver of them, and, that the debts due and owing to the said *John Horn*, *Robert Horn*, and *William Horn*, as late partners, which on the 1st day of *March* 1801, were considered good and recoverable. And also all the horses, carts, drays, and casks of the said late copartnership (save and except certain stills, vats, and utensils in that behalf agreed upon should be purchased by the said *William Horn* and *Richard Jackson*, the said *Robert Horn* having consented thereto,) at 1815l. and that the said *John* should lend to the said *defendants* 1815l. and should forbear and give day of payment to the said *defendants* of 1815l. from the 20th of *March* in 1801, until and upon the 1st of *September* 1801, and that the said *defendants* for the loan of 1815l., and for the forbearing and giving day of payment thereof from 20th of *March* 1801, until and upon 1st *September* 1801, should pay to the said *John* so much money as would amount to the interest of the said 1815l. from the 1st *March* 1801, to the 1st *September* 1801, at the rate of paying 5l., for the forbearance of 100l. for one year, although the said 1815l. was not in fact lent by the said *John* to the said *defen-*

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dants on the said 1st. of *March* 1801, nor until long after the said 1st *March*, and although the said debts due and owing to the said *John Horn*, *Robert Horn*, and *William Horn*, as copartners as aforesaid, and which amounted to a great part of the said 1815l. were not in fact paid to the said *defendants* until long after 1st *March* 1801, and the same did not carry any interest thereupon, and that the said *defendants* for securing to the said *John* the payment of 1815l. and of the sum of money to be given for the forbearance and giving day of payment thereof, from the 20th of *March* 1801, until and upon the 1st *September* 1801, upon the said 1st *September* 1801, should seal, and as their deeds deliver to the said *John* a certain writing obligatory in the penal sum of 3630l., with a condition thereunder written for the payment of 1815l. with legal interest for the same, to commence, and be computed from 1st *March* 1801, to the 1st *September* 1801, and that the said *defendants* for securing the payment to the said *John*, his executors, administrators, and assigns, of the said annuity or yearly sum of 600l. should seal, and as their deed deliver to the said *John* a certain writing obligatory in the penal sum of 5000l. with a condition thereunder written for the payment unto the said *John Horn*, his executors, administrators, and assigns, for and during the natural lives of him, the said *John Horn* and *Elizabeth* his wife; and the life of the survivor or longer liver of them. One annuity or yearly sum of 600l. of lawful money of *Great Britain*, free from all taxes, &c. Stating the above bond and condition. The pleas stated the giving the bonds for securing the same and giving day of payment for the same, and that the money so agreed to be paid and so secured to be paid by the said *defendants* to the said *John* for the forbearing and giving day of payment of the said sum of 1815l. during the time aforesaid, exceeds the rate of 5l. for the forbearance of 100l. for one year,

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whereby the said writing obligatory in the said first and second counts of the said declaration mentioned and now brought here into court by force of the statute in such case made and provided, are void in law. And the *defendants* also pleaded that the said writing obligatory in the said second count of the said declaration mentioned, with the condition thereunder written was sealed and delivered, and made and given after passing a certain act of parliament made in the 17th year of the reign of his present majesty, entitled "An act for registering the grants of life annuities, and for the better protection of infants against such grants" to wit on the 20th of *March* 1801. That no memorial of the said writing obligatory, and of the said condition thereunder written, was within 20 days of the execution thereof enrolled in the high court of chancery, as required by the said act of parliament, by reason whereof the said writing obligatory in the said 2d count of the said declaration mentioned is null and void.

The *plaintiff* replied, demurring generally to the last plea and tendering issues, upon the other special pleas of usury.

BURROUGH for the *plaintiff*, cited *Crespigny* v. *Wittenoom*,* and *Lewis* v. *Hutton*,† to shew that this could not be within the annuity act. Lord *Kenyon* there says, if the proviso did not except annuities which were not for a consideration in money, yet the construction would be the same; for the first clause does not extend to every case of every sort, but only to those cases mentioned thereafter; viz. to annuities for money. In order to avoid the bond, the *defendant* ought to state not merely that it is void by the statute, but that it is void for the particular reasons stated in the statute, and so being it is precisely within the statute 17 *Geo. III.* c.

* 4 *Term Rep.* 790. † 5 *Term Rep.* 639.

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26. He cited also the *Duke* of *Cumberland* v. *Praed*,* *Whelpdale's* case.*

LITTLEDALE *contra*; it is not necessary to aver in the plea more than is done in this case. In *Crespigny* v. *Wittenoom*, the act is pleaded generally, and this is matter of construction, which arises from the whole of the statute, and in that case Lord *Kenyon* considered it as a construction taken from the whole of the act, therefore, if it does not fall within the operation of the act, the *plaintiff* ought to reply, that,"

Lord ELLENBOROUGH, C. J. "The very spirit of the act in the first section applies merely to an annuity to be granted and sold for money. Lord *Kenyon* was so clear on the construction, that he thought the last clause should not extend to any voluntary annuity granted without a money consideration, was absolutely unnecessary. And here it does not come in by way of proviso, it is a positive enactment, and you blend altogether so as to elicit from the whole one plain sense of the act."

LITTLEDALE. "So in the statute of wills and fines, where the act excepts persons insane and infants who would be excepted by ordinary construction of law, yet the proviso must be pleaded. *Stowell* v. *Couch*.‡"

Lord ELLENBOROUGH, C. J. "That is, where the body of the act is general, and the proviso is particular. I do not know, that I am bound to stand upon the first section only for the construction; but, if I come to the second, I am certain; and, if I look at the third I am more certain; and if at the last, I wonder how they could make a proviso to exclude that which no person could ever have doubted upon.

JUDGMENT for the PLAINTIFF.

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* 2 *H. Black.* 280. † 5 *Co.* 119. ‡ *Plowd.* 376.

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HINDE *against* WHITEHOUSE.—June 19.

Statute of frauds Auction. Sale of goods. Agreement.

Sugars were sold by auction, by a broker according to a certain catalogue, which did not contain the entire particulars or conditions of sale; the conditions or very material parts of them, were written on a separate paper and read by the broker at the sale, and laid by him on the desk with the catalogue, the catalogue was entitled only "a catalogue of sugars, to be sold 20*th* September, *for particulars apply, &c.;" the conditions were entitled conditions of sugar sale,* 20*th* September, *but there were no direct words of reference to either in the one or the other, and they were not pinned together; at the time of the sale the broker's clerk wrote a memorandum of the name of the purchaser, (the* defendant) *against the article sold with the price and samples of about an half-penny a pound each, were delivered, which were calculated on the weight of the commodity: Held that, although the broker must be considered as the agent of both parties, yet as the catalogue did not contain all the conditions of sale, and the conditions were chiefly on a separate paper, the memorandum was not a memorandum in writing, within the statute of frauds; but, by the delivery of the sample, the case was taken out of the statute, for, although a sample is a thing delivered* alio intuitiu, *and not principally as a part performance of the contract, yet, where it is a part of the commodity and taken in the weight or measure, it may also operate to comply with the terms of the exception in the statute. Sales by auction of goods are not to be considered as excepted, by the equity of the statute of frauds.*

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THE *plaintiff* declared on a contract, that being possessed of certain sugars, he caused the same to be put up to auction, upon certain conditions as follows: the highest bidder to be the purchaser, and, in case of dispute, the lot to be put up again. The sugars to be taken with all faults and defects, as they now are at the king's weights and tares, with the allowance of

drafts, or reweighed giving up the draft. To be at the purchaser's risk from the time of the sale, and to be positively removed within two months, or rent to be paid for any longer time they may remain. Payment to be made on delivering of invoices, by approved bills on *London* to the satisfaction of sellers, not exceeding three months date; not to advance less than three pence per *cwt.* at each bidding. That the *defendant* purchased twenty-seven hogsheads of sugar at 75s. per *cwt.* at the king's weights and tares, with the allowance of draft, and in consideration of the premises, the *defendant* undertook to buy, and the *plaintiff* to deliver, stating the mutual promises. The *plaintiff* then averred, that the same was delivered afterwards, to wit, on the 23d *September*, whereupon the *defendants* became liable to pay.

At the trial, before ROOKE, J. at *Lancaster*, the principal question was, whether the *plaintiff* or *defendant* was to bear the loss of certain hogsheads of sugar, which were sold by auction to the *defendant* on the 20th of *September*, 1805, and were burned on the 22d of the same month, by an accidental fire in one of the king's warehouses, at *Liverpool*, where they were deposited under the lock and key of the *plaintiff*? The *defendant* bought at the sale twenty-seven hogsheads at 74s. per *cwt.* he being the highest bidder. There was a memorandum made on the catalogue against the articles therein, by the clerk to the broker, viz. *Gale* and *Whitehouse* purchasers. When the sale was over, the broker's clerks gave the samples to the warehouseman. *Sill* who was the broker employed, gave evidence as follows: "I was employed to sell; the conditions were in writing, and entitled conditions of sugar sale, *September* 20th 1805. They stated that the sugars were to be taken with all faults and defects, as they now are; that they were to be taken with the

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king's weights and tares, or reweighed and this further condition which he read from a written paper.

"These sugars gentlemen have been drawn in the warehouse, within the last two days, as such, no allowance whatever will be made, except where an evident error is manifest. The duties are not yet paid but we intend paying them to-morrow."

The purchaser said nothing at the time; the invoice was made out on the *Saturday*; the *defendant* after the fire, gave me instructions to take care of the sugars, and save what I could. If the sugars are to be reweighed it is usual for the buyer to declare so, before he leaves the room; the 21st of *Sept.* was *Saturday* St. *Matthew*, which was kept as a holiday at the custom house; and *Sunday* the 23d, being also a holiday kept on the *Monday*, the duties could not be paid till the 24th. The sale ended at a quarter past 4 o'clock. The custom house hours were only till two; so that there was not time, after the sale, to pay the duties on that day." The jury thought there was no neglect on the part of the *plaintiff*, as to the payment of the duties. *Sill* gave evidence also as follows; "the memorandum of the sale was on the catalogue: the conditions of sale were on a separate paper, which was laid on the desk with the catalogue, after being read. The samples were about half a pound each, and are usually delivered to the purchaser as part of the purchase. These samples were delivered immediately, before the parties left the room, and the purchasers always require to have them as part of the quantity. Out of 27 hogsheads it amounts to 14lbs. I gave the samples to be delivered to the warehouseman, to make up the quantity and they were carried to the *defendant*, the day of the sale; the invoice was sent on the *Monday* following." He also proved that it is very usual for a purchaser to sell at an advanced rate, before he leaves the room; and he believed that the *defendant*

did so in this case. The counsel for the *defendant* objected that there was not a sufficient memorandum in writing signed by the parties, under the statute of frauds to make the sale valid; the memorandum being made by the broker only and not by the *defendant* or any authorised agent of his; and contended, that the sugars were not at the risk of the *defendant*: that the memorandum did not contain all the conditions which were on a separate paper. There was, however, a verdict for the *plaintiff*, and a rule being obtained, to shew cause why the verdict should not be set aside, for a misdirection of the learned judge in point of law.

PARK, TOPPING, and SCARLETT, for the *plaintiff*, now shewed cause. The case of *Simon* v. *Motivos** is precisely the same case with this; and Lord *Mansfield* then said that the inclination of his opinion was, that auctions were not at all within the statute: that the ceremony of weighing out, to bind the bargain, in the Roman law, was similar to the solemnity of a sale by auction.

Lord ELLENBOROUGH, C. J. "What written evidence is there to lead him from the catalogue to the conditions? The catalogue is only "to be sold by auction;" but it is not said according to certain conditions in a paper to be produced at the time; if they were pinned together, there would be a clear union, and the memorandum of the sale might be said to contain the terms of the sale. A sale by auction is a case of all others in which the statute ought to have its operation. I am convinced of this from my experience, of the manner of conducting such sales, as we see every day at the sittings."

LAWRENCE, J. "Considering what we hear from

* 1 *Sir W. Bla.* 599. 3 *Burr.* 1921.

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auction and the catalogue merely states the thing to be sold; that cannot refer to the conditions, and even if the date be stated, and if the conditions are signed the same day it will be immaterial."

Lord ELLENBOROUGH, C. J. "There is no date or signature, and both of them, the conditions and the catalogue, are before the auction.

GIBBS. "As to the past delivery, the exception in the act is unless the buyer accept a part of the goods so sold and actually receives the same;" but how can this be considered as a part of the goods sold? It was delivered as a sample and not as a part of the goods. The seller also was to pay the duties, on the thing delivered, before the delivery; the whole commodity therefore is sugar, upon which a duty is to be paid, but upon these samples no duty is paid. In order to make the delivery of part binding, it must be a substantial part delivered as a part of the thing; but if a man takes a small sample of linen, a small strip, that is not delivered: neither are these samples of sugar as the substance of the thing sold; but they were merely to enable the parties to shew it to others, as a sample of the goods."

They, therefore, again contended that a nonsuit should be entered or a new trial had.

Cur. adv. vult.

And, now the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. "This is a sale by auction of sugars burnt in the king's warehouses, while under the king's lockers for the payment of the duties; and the question is whether after the sale, they became the goods of the purchaser? They were put up on the 20th of *September* 1805, according to the conditions of sale entitled sugar sale 20th *September*, but there

were other conditions, which regarded the payment of the duties which were read at the time of the sale. The fire happened on the 22d, and it is admitted that there were no laches in the *nonpayment* of the duties, between the time of sale and the fire. Two questions arise on the stat. of frauds, s. 17. One of which depends upon the consideration, whether what has passed is a valid contract of sale with respect to the terms of that section? The first question arises on the latter words of the statute, and that question is whether the writing put in the catalogue of the sale can be considered as a note or memorandum in writing within the meaning of the statute. The second question is whether this is a case in which the buyer can be said to have accepted part of the goods sold, and to have received the same. Paramount this question, it has been argued that sales of goods by auction, are not within this clause at all: and for this purpose *Simon* v. *Motivos*, has been cited, which is reported in 3 *Burr.* 1921, and also in 1 *Black.* 599; but in the latter report there are some particulars, as to the grounds of the opinions of the judges, which are not mentioned in the former. Lord *Mansfield* says the solemnity of that kind of sale, precludes all perjury in the fact itself of the sale, and according to the inclination of his then present opinion sales by auction were not within the statute; and Mr. Justice *Wilmot* inclined to think sales by auction openly transacted before 500 people were not within the statute, which was meant to be applied only to clandestine sales. But, with all due deference to such high authorities, I do not feel that any reason exists in these cases to dispense with the requisitions of the statute. Shall they be excepted, merely because the *quantum* of parol evidence is likely to render the danger of perjury less? That argument applies to all sales in market overt; and if you once get rid of the statute, in respect to sales by auction, on this account, it must

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rest on the *quantum* of evidence, and the probability of perjury in every case whatsoever; and you must mix in the consideration of the law as fixed by the statute, all the variety of circumstances attending the sale. It must render the provisions of the statute liable to be dispensed with, in a variety of circumstances, and I am not at all prepared to say, that sales by auction, merely as such, are not within the statute. Then is this paper made by the agent for both parties? In respect to sales of goods, it has been uniformly so held, ever since *Simon* v. *Motivos*, and it would be dangerous to break in upon a rule which operates in all cases where brokers are employed by the seller, and where a sale note has been held, a sufficient contract under the statute of frauds. All the great transaction of sale in the city of *London* are conducted in that way, and it is too late to draw this doctrine into question now. Then, supposing that the auctioneer or broker for the seller is the agent for both parties, the question is, has he made a proper memorandum of the agreement in writing, within the terms of the statute? It appears that he has not. This memorandum is not annexed to the conditions of sale and has no reference to it; it is a mere memorandum of the purchaser. In order to make it the memorandum of the agreement, we must intend it to be sold for the price mentioned, without regard to the conditions of sale, which is contrary to the fact, and those conditions are capable of being given in evidence as part of the transaction of sale, though they cannot be given in evidence as the contract itself; that is, as part of the *memorandum* of the agreement. Then as to the other question, whether there has not been a part delivery, inasmuch as by the *delivery* of the samples, consisting of about 14lb. weight, the *defendant* has received a part of the commodity sold. This is so far treated as a part of the bulk, that it is considered in the weighing as part of the bulk weighed

out to the party; and I consider it as part of the goods sold under the terms of sale, and accepted by the buyer, though delivered *alio intuitu* as a sample, which does not prevent it from operating in the other way as a part delivery of the thing itself. And as the thing itself was become incapable of delivery by the non-payment of the duties, the sale, in the meaning of the parties, was complete when the samples were delivered. Then the condition that the goods from the time of the sale, shall be at the risk of the purchasers attaches, notwithstanding the immediate rights of *lien*, or custody was in the crown, for the non-payment of duties. In *Salkeld*, 113, it is said, "after earnest given, the vender cannot sell, without default of the vendee;" and in *Noy's Maxims*, p. 88. "If I sell my horse for money, I may keep him till I am paid; but I cannot have an action of debt until he be delivered, yet the property of the horse is in the bargainor or buyer." Upon this latter ground there is, therefore, no pretence to think the sale incomplete, and it is clear, that, by the delivery of part, the contract of sale is valid as far as respects the statute. As to *Simon* v. *Motivos*, that case is not now impeached, nor is any further authority attached to it. The practice of sale notes too is a practice on which all the commerce of the country depends; but they contain they full contract. On the point that an auction is itself a mode of sale, excepted out of the statute, it is not necessary to say more than that there is no necessity of deciding that point upon the present occasion, that I see no reason to except it, and that it is not excepted out of the statute by express words. It is not necessary to say whether the case of *Simon* v. *Motivos* is right or wrong. Here the sample was delivered to the *defendant*, as part of the thing; but I do not question, that an auctioneer is the agent of both parties.

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GROSE J. observed that the true name of the case was *Simon* v. *Metivier*, and, that he recollected, that it was doubted at the time by some persons at the bar.

LE BLANC, J. "There is one clear mode of taking it out of the statute, by the delivery of the goods. I think it leaves *Simon* v. *Metivier* just where it found it."

RULE DISCHARGED.

HODGSON *against* FIELD.

Trespass. Grant.

Grant to one his heirs and assigns, in consideration of a sum of money, of a liberty for him, his heirs and assigns, to carry up a sough (or a drain for a colliery) from the bottom of a piece of land of the grantor to an adjoining piece of land of the grantee, and also liberty for him, his heirs and assigns, to make two little sough pits in the said land of the grantor, in a certain place there, for the more easy and safe carrying up the tail of the sough, one of them to be covered from the top of the intended sough to the surface of the ground, as soon as conveniently may be done, after the making thereof, and the other to be kept open for examining the sough as long as is necessary for that purpose and no longer; held, that the grant of the sough is a continuing grant, and the right of opening the sough pit, occasionally, for the necessary repair of the sough, is incident thereto by virtue of the grant.

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THE *plaintiff* declared against the *defendant*, in trespass for breaking his close at *Heaton* in the county of *York*, and also for that he then and there dug and made a certain pit of the depth of 50 feet, &c. and then and there opened and uncovered a certain sough or drain in the said close, and kept and continued the said pit, or hole so dug and made as aforesaid, and the said sough or drain so opened and uncovered for a long space of time, &c. Pleas, 1st, not

guilty; 2dly, that the said close in which, &c. now is and at the said times when, &c. and also at the time next hereinafter mentioned, was a certain piece of woody ground, situate and being in *Heaton* aforesaid, in the said county of *York*, abutting towards the north, upon a certain brook there, and upon another part thereof contiguous and next adjoining to the parcel of woody ground situate and being in *Heaton* aforesaid, and at the time of the making of the indenture next hereinafter set forth mentioned, as at the time of making that indenture, being in the possession of *Jasper Pickard;* and the said *defendant* further says, that long before the said several times, when, &c. and before the said *plaintiff* had any thing in the said close in which, &c. to wit, on the 13th day of *July*, 1747, one *Robert Stansfield* was seised in his demesne as of fee of and in the said close in which, &c. and one *Jeremy Marshall* was also, at the same time, seised in his demesne as of fee aforesaid, of and in the said parcel of woody ground adjoining thereto, and also of divers, to wit, 35 acres of land situate and being in *Heaton* aforesaid, and adjoining to the said parcel of woody ground, and that within and under the same parcel of woody ground, and the said other lands of the said *Jeremy Marshall*, there then were divers veins and seams of coal which the said *Jeremy Marshall* was then, to wit, at *Heaton* aforesaid, desirous of winning, and of digging, getting and raising the coal therefrom, and of having the use and benefit of a sough, for himself his heirs and assigns to be made and carried up as hereinafter is mentioned, for the purpose of draining the mines and works within and under the same, and thereby enabling him and them the better and more conveniently to dig, get, and raise the said coal, and the said *Jeremy Marshall* then and there applied to the said *Robert Stansfield* to grant unto him his heirs and assigns for the purpose aforesaid, the liberties and privileges mentioned in the indenture next herein-after set forth, whereof the said *Ro-*

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bert Stansfield then and there had notice; and thereupon the said *Robert Stansfield* and *Jeremy Marshall* being so respectively seised as aforesaid, and the said *Jeremy Marshall* being so desirous as aforesaid, afterwards and before any of the said times when, &c. and also before the said *plaintiff* had any thing in the said close in which, &c. to wit, on the day and year last aforesaid, at *Heaton* aforesaid, by a certain indenture then and there made between the said *Robert Stansfield* of the one part, and the said *Jeremy Marshall* of the other part, and sealed with the seal of the said *Robert Stansfield*, (but since lost by time and accident, so that the said *defendant* cannot bring the same into court here) the said *Robert Stansfield* did for the considerations therein mentioned, give and grant unto the said *Jeremy Marshall* his heirs and assigns full and free liberty for him the said *Jeremy Marshall*, his heirs and assigns, and his and their agents and workmen, to carry up a sough from the bottom or edge of the hill near the brook, in the said close, in which, &c. in the said indenture called a parcel of woody ground in *Heaton* aforesaid, in the said county then being the estate of the said *Robert Stansfield*, and then in the possession of one *Peter Atkinson*, into the said parcel of woody ground of the said *Jeremy Marshall* in *Heaton* aforesaid, in the possession of *Jasper Pickard*, which said two several parcels of woody ground are in the said indenture mentioned to adjoin upon and lie contiguous to one another; and also full and free liberty for him the said *Jeremy Marshall*, his heirs and assigns, and his and their agents and workmen to make two little sough pits in the said parcel of woody ground of him the said *Robert Stansfield* near the edge of the hill or brook there, for the more easy and safe carrying up the tail of the said sough; one of the said sough pits to be covered from the top of the said intended sough to

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the surface of the ground as soon as conveniently might be done after the making thereof, and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer, and also full and free liberty for the said *Jeremy Marshall* his heirs and assigns, and his and their agents and workmen to get stones in the said parcel of woody ground belonging to the said *Robert Stansfield*, for making the said intended sough, and for mending and repairing such part of the fence or walls belonging to the said *Robert Stansfield* in the said woody ground, as should be broken down or injured, by the said *Jeremy Marshall*; by virtue whereof the said *Jeremy Marshall* became and was seised of and entitled to the said liberties and privileges so given and granted as aforesaid, and to have and enjoy the same for the purpose in that behalf aforesaid to him his heirs and assigns, as to the said parcel of woody ground, and the said other lands of the said *Jeremy Marshall* belonging and appertaining, and afterwards, to wit, on the same day and year last aforesaid, at *Heaton* aforesaid, for the purpose in that behalf aforesaid, the said *Jeremy Marshall* carried up the said sough in manner aforesaid; and made the said two sough pits, in manner aforesaid, and exercised and enjoyed the said liberties and privileges so granted as aforesaid, for the purpose in that behalf as aforesaid, together with the said parcel of woody ground of the said *Jeremy Marshall* and as belonging and appertaining thereto, and the said *Jeremy Marshall* being so seised and entitled as aforesaid, afterwards, to wit, on the 4th day of *May*, 1758, at *Heaton* aforesaid, in the county aforesaid, by a certain indenture then and there made between the said *Jeremy Marshall*, by the name of *Jeremiah Marshall* of the one part, and one *Thomas Fenton* of the other part, (one part of which said indenture sealed with the seal of the said *Jeremy* the said *defendant* brings here into court the date

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whereof is the day and year last aforesaid) the said *Jeremy Marshall* for the consideration of a certain sum of money to him, then and there paid by the said *Thomas Fenton*, bargained and sold to the said *Thomas Fenton* amongst other things the said parcel of woody ground, and the said other lands of the said *Jeremiah Marshall*, together with all ways, paths, passages, waters, watercourses, easements, liberties, privileges, rights, commodities, emoluments, hereditaments, and appurtenances, whatsoever to the said parcel of woody ground, and the said other lands of the said *Jeremy Marshall*, or any part or parcel thereof belonging or in anywise appertaining or therewith, then or theretofore commonly demised, used, occupied, or enjoyed, or accepted, reputed, had, taken, or known as part, parcel or member thereof, or of any part or parts thereof. The plea then set out divers conveyances of the *woody land* by which the title thereto, and to the ways and appurtenances thereto belonging, was deduced to the present time, when it was vested in the *defendant*, and stated that the *defendant* at the said several times when, &c. was and still is seised of and in the said parcel of *woody ground*, and the said other lands heretofore of the said *Jeremy Marshall*, and of the mines, seams, and veins of coal within, and under the same, with the appurtenances, in his demesne as of fee, and entitled to use and enjoy the said sough, together with the same parcel of ground and the said other lands, for the purpose in that behalf aforesaid, for himself, his heirs, and assigns, as to the same parcel of ground and other lands, with the appurtenances belonging and appertaining. And the said *defendant* further saith, that all the said seams and veins of coal, at or before the said several times when, &c. were not won from within and under the same parcel of ground and the same other lands, nor was all the *coal* then dug, got, or raised therefrom, and the said

sough had been and was from the time of making and carrying up the same as aforesaid, used and enjoyed for the purpose in that behalf as aforesaid, together with the same parcel of *woody ground*, and the same other lands, and as belonging and appertaining thereto; and until and at the said several times when, &c. continued to be, and was except so far as the same had been or was obstructed for want of repairing, opening, and cleansing the same, useful and beneficial to the said *defendant*, for the purpose in that behalf aforesaid; and because the said sough at the said several times when, &c. was extremely ruinous and decayed and obstructed, for want of the needful and necessary repairing, opening, and cleansing thereof, he the said *defendant* did at the said several times when, &c. enter and cause to be entered into the said close, in which, &c., and did then and there dig and make and cause to be dug and made the said pit or hole in the said declaration mentioned, and did open and uncover the said sough or drain in the said declaration mentioned, in the said close in which, &c. being the said sough in the said indenture first above set forth mentioned, and keep and continue the same pit or hole so dug and made as aforesaid, and the said sough or drain so opened and uncovered as aforesaid, for the said time in the said declaration mentioned, as the said *plaintiff* hath above thereof complained, for the purpose of the needful and necessary repairing, opening, and cleansing the sough, for the uses and purposes in that behalf as aforesaid; as he the said *defendant* then and there lawfully might, the same then and there being necessary, reasonable, and proper to be done for the purpose of such repairing, opening, and cleansing the said sough.

Replication. That the said indenture in that plea mentioned was an indenture in these words, that is to

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say, "this indenture made, &c. A.D. 1747, between *Robert Stansfield*, Esq. of the one part, and *Jeremy Marshall* of the other part, witnesseth, that the said *Robert Stansfield* for and in consideration of the sum of 40*s.* of lawful *British* money to him in hand paid by the said *Jeremy Marshall* at or before the execution thereof, the receipt whereof he doth hereby acknowledge, and of the covenant or covenants hereinafter contained, and by the said *Jeremy Marshall* his heirs and assigns, to be done and performed, hath given and granted, and by these presents doth give and grant unto the said *Jeremy Marshall* his heirs and assigns, full and free liberty for him the said *Jeremy Marshall* his heirs and assigns, and his and their agents and workmen to carry up a sough from the bottom or edge of the hill near a brook in a parcel of woody ground in *Heaton*, in the said county, being the estate of the said *Robert Stansfield*, and now in the possession of one *Peter Atkinson*, into a parcel of woody ground of the said *Jeremy Marshall* in *Heaton* aforesaid, in the possession of *Jasper Pickard*, which said two several parcels of woody ground adjoin upon or lie contiguous to one another; and also full and free liberty for him the said *Jeremy Marshall* his heirs and assigns, and his and their agents and workmen to make two little sough pits in the said piece of woody ground of him the said *Robert Stansfield*, near the edge of the hill or brook there, for the more easy and safe carrying up the tail of the said sough, one of the said sough pits to be covered from the top of the said intended sough to the surface of the ground as soon as conveniently may be done after the making thereof, and the other to be kept open for examining the sough as long as is necessary for that purpose, and no longer: and also full and free liberty for him the said *Jeremy Marshall* his heirs and assigns, and

his and their agents and workmen to bring the rubbish which may rise in another sough pit made or intended to be made in the said parcel of woody ground of the said *Jeremy Marshall* from such last-mentioned sough pit, and cast and throw the same into a certain hollow place, in the said parcel of woody ground belonging to the said *Robert Stansfield*; and near the said brook there, for the rendering more safe and commodious the cartway which is intended to be made by the said *Jeremy Marshall* for the inhabitants of *Shipley*, and others through his own ground there, to and from the intended colliery, and also full and free liberty for the said *Jeremy Marshall* his heirs and assigns, and his and their agents and workmen to get stones in the said parcel of woody ground belonging to the said *Robert Stansfield* for making the said intended sough, and for mending and repairing such part of the fence or walls belonging to the said *Robert Stansfield* in the said woody ground as shall be broken down or injured by the said *Jeremy Marshall* his heirs or assigns, or his or their agents or workmen; and the said *Jeremy Marshall* for himself, his heirs, executors, and administrators doth covenant and agree to and with the said *Robert Stansfield*, his heirs and assigns, that he the said *Jeremy Marshall* his heirs or assigns, or his or their agents or workmen shall not do any damage to the trees growing in the said parcel of woody ground of him the said *Robert Stansfield*, nor get any of the said *Robert Stansfield*'s coals but what shall arise in the drift of the said intended sough, and that it shall and may be lawful to and for the said *Robert Stansfield*, his heirs and assigns and his and their agents from time to time and at all times after to descend or go down into any pit or pits of the said *Jeremy Marshall* his heirs or assigns, for the better discovering whether any coals of the said *Robert Stansfield*, his heirs or assigns,

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shall be gotten save as aforesaid; and also that he the said *Jeremy Marshall*, his heirs and assigns, shall not only mend and repair such part of the fence or walls of him, the said *Robert Stansfield*, his heirs or assigns, as shall be broken down or injured by the said *Jeremy Marshall*, his heirs or assigns, or his or their agents or workmen, but shall also from time to time, and at all times make good, maintain, and secure that part of the fence or walling towards the banks of the said brook where the said rubbish is intended to be laid. In witness whereof the parties above named to the parts of these indentures have interchangeably put their hands and seals the day and year first above expressed. *Jeremy Marshall* (L.S.)" And the said *plaintiff* further says that, after the said *Jeremy Marshall* had carried up the said sough, and made the two sough pits, as in the said last plea is mentioned, and long before the said time when, &c. to wit, A.D. 1776, it became and was no longer necessary to keep open either of the said sough pits, for the purpose of examining the said sough, and thereupon the said sough pits were, afterwards and long before the said time when, &c. to wit, on the day and year last aforesaid, respectively filled and covered up to the surface of the ground by and with the consent and approbation of the person then seised of and in the said parcel of woody ground, and the said other lands heretofore of the said *Jeremy Marshall* with the appurtenances, and entitled to use and enjoy the said sough, together with the same ground, for the purpose in the said plea in that behalf mentioned, and have not since been kept open, to wit, at *Heaton* aforesaid, and this the said *plaintiff* is ready to verify, wherefore he prays judgment and the damages by him sustained on occasion of the committing the said trespasses in the introductory part of the said last plea mentioned to be adjudged to him, &c. To this the *defendant* demurred, and he *plaintiff* joined in demurrer.

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HOLROYD, for the *defendant*, in support of the demurrer; "by the grant of the sough, a right to keep the pit in repair is granted as incident thereto; for where there is a power of making a thing, and the party has the use of it, he has a right to keep it in repair."

"If a man bargains and sells all his trees, growing upon certain lands whereof he is seised, the bargainee has power given him, as incident to the grant to come upon the land and cut down and carry away the trees, at whatever time he pleases, and the coming upon the land is justifiable."* So, "if a man grants to me to make a trench in his soil from such a fountain unto my house, so that I may put a pipe to convey the water to my place, (or house) in a conduit, if, after, my pipe be stopped, I may dig the ground to amend the pipe; for it is incident to the grant."† So what is said by *Twisden*, J. in *Pomfret* v. *Roycroft*,‡ is to the same point for *quando aliquid conceditur, id conceditur sine quo res ipsa uti non potest.*" "A farmer of the king of a capital messuage makes a conduit to convey water to his house, through the land of a copyholder of the manor, and afterwards, the king grants the capital messuage to A. with the appurtenances, and the copyhold was granted to another person; adjudged that the farmer may dig the ground to amend the pipe, because *terra transit cum onere*, *Guy* v. *Brown*.¶ Here the grant to *Jeremy Marshall* is intended to have continuance, and to vest in him his heirs and assigns; and the interest which he has in it is not merely to make the sough, but to continue it, and the provisions for keeping open the soughs for a certain time, as expressed in the deed, do not take from him the right of repair, for the cases put as before cited are ex-

* 2 *Rol. Abr.* 567. † 9 *E.* 435. *b. Curia.* ‡ *Vent.* 43; *see also* 1 *Saund.* 321. ¶ *Mo.* 644. *pl.* 19.

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actly in point, that a person has a liberty to make a pipe or lay a pipe, the right of repair is incident thereto.* The grant also extends to the coals under both the lands. *Stansfield* was seised of the woody ground, the close in question, through which the sough was to be carried from the side of the hill to *Jeremy Marshall's* woody ground, the liberty, therefore, could only be granted in *Stansfield's* own ground and not in *Jeremy Marshall's*. The vein of coal in the other lands was a continuance of the vein of coal under *Jeremy Marshall's* woody ground. The situation of the parties is, therefore, to be considered, and the question is, whether, when *Jeremy Marshall* was seised of land, and the veins of coal underneath, the land being a part of the woody ground, and also of other ground, and being desirous of working the veins of coal under both lands applies to *Stansfield*, for liberty to dig pits and to carry up his sough, and such a grant is made, it should be restrained merely to the first making of the sough.

LAWRENCE, J. "The grant is to make a sough from the bottom of the hill near a brook in a parcel of woody ground of *Stansfield* into a parcel of woody ground of *Jeremy Marshall's*, the two pieces of land only are mentioned, the ground from which and into which it is to be carried; the other circumstances are stated only in the plea, and not in the grant."

HOLROYD. "When *Stansfield* grants the sough to go up to *Jeremy Marshall's* woody ground, he takes notice of that only which is on his own ground, the purpose is not mentioned in the grant."

LAWRENCE, J. "If any other purpose made it necessary to drain the lands of *Jeremy Marshall* according to your construction, he might do it, under this grant, by means of the sough."

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HOLROYD. "The grant being general, no extrinsic circumstances are to be taken into consideration to restrain it; or if they are, then these circumstances are to be considered, and we are to take it as fully as the purposes for which it was originally intended may require. "Grants will take a different operation, according to the estate of the person who grants."*

Lord ELLENBOROUGH, C. J. "How can we take into consideration other circumstances, there being no averment?"

HOLROYD. "If not, we have the grant generally for all purposes; and if the other circumstances are to be taken into consideration, then we may enquire into the estates of the grantor and the grantee, the object for which it was granted, and the situation of the lands."

Lord ELLENBOROUGH, C. J. "The grant to his heirs and assigns might be necessary, if the thing is to be done at all, for the grantee might die before it is completed."

HOLROYD. "In the case in *Roll* there was merely the grant of a pipe."

Lord ELLENBOROUGH, C. J. "In the case in *Saunders* it is a grant of the use and occupation, which was plainly a continuing grant, and there he might lose the thing, if he could not repair it, the grantor not being bound to repair it."

HOLROYD. "There is nothing of continuance in the case in *Roll* or the points laid down in *Shepherd*, "If a man grants to me to make use of his land to lay a pipe to convey water from a farm to my house,"

* *Shep. Touch.* 87, 88.

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these are not words containing any terms of continuance. Here it is not a grant to *Jeremy Marshall*, that he his heirs and assigns shall make; but to *Jeremy Marshall* his heirs and assigns, that he his heirs and assigns shall do it; a liberty in fee granted to the grantee; and sough pits are necessary to the grant of the drain."

WOOD, *contrà*, made two questions; first, "Whether the right of repair, by making and opening sough pits, is incident to the grant of the liberty of making the sough;" and secondly, which he considered as the most material question, "whether the grant can be extended to give a right to use and to continue the sough for taking other coals under other lands." As to the case in 2 *Roll*, 56, in the case of a grant of trees in another's lands, the grantee must have a right to enter to cut them down, or else he could not possibly take the thing granted; but it is otherwise here when the sough is once made. In the case of the pipe cited for the *defendant*, there is evidently a continuing grant, which from the nature of the thing is to be perpetual. Here then is a grant to make one particular thing; there are only two closes mentioned from and to which the sough is to be made, namely the piece of woody land of the *plaintiff* and that of the *defendant*; the sough is, therefore, to be confined to that extent only, and it must be meant for the purpose of draining the coal pits in that woody ground and no further: and the sough pits which were first opened, have in fact been filled up long ago, by the consent of both parties; and they were by the express language of the grant, to be kept open so long as they might be necessary for the examining of the sough and no longer. There is in the grant, an express mention of repair for a particular purpose, and speaking of repairs in one instance, the parties would have extended it to others, by express terms, if it had

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been their intention to limit it. As to the grant to him and his heirs, that might be intended to provide either for the case of the grantee dying before the sough is made, or for a case equally possible, if the sough should by accident get out of repair during the time of its continuance for a partial and limited purpose. This by the terms of the deed, being granted merely in and through a certain piece of woody land, is like the grant of a way from A. to B. over a certain close, which cannot be extended; for if a man have a way from A. to B. and he purchase land adjoining: he cannot use the way as a way to the adjoining land, although he goes by B. to the adjoining close." *Howel* v. *King*.*

LAWRENCE, J. "Might not the colliery be in some other part of *Marshall's* land; when he had got the right of making the sough through the woody ground, might he not have carried it on, thence, to his colliery?"

WOOD. "If so they would have stated it in the grant. And it is not necessary to state in the replication, that there is no necessity for a sough in the woody ground; because it is alledged in the plea, which makes it not necessary to new assign; and it is expressly claimed, because he has occasion to use it not only for draining the woody ground but other lands, for the purpose of raising coal from both lands. This grant, however, does not warrant the use of the sough for the purpose of raising the coal from both lands; and no extrinsic circumstances can be taken into consideration."

HOLROYD, in reply; "in the case in *Roll* the grant is only to lay a pipe to drain the water from the house;

* *Luter* 111. 1 *Mod.* 10. *Lord Raym.* 75.

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but it does not state whether it is to be a continuing drain or for how long a time it is to be. It would be a very strange construction of such a grant, that when there is a grant for a sum of money to a man in fee, to make a drain, it is not to be a continuing grant; for it would be a burthen and not a privilege, to make the drain, if it should not be a grant of a liberty to repair it, without which it would be absolutely useless. In the case in *Roll* it is said, that the grant of the pipe for an indefinite time, will be for the period of the grantee's estate in the land, which shews that extrinsic circumstances may be taken into consideration; this is very different from a way. It is impossible to work the main, without a continuing drain or steam engines. This, therefore, is necessary to the grant, and the abuttals and bounderies of the sough are not to limit the extent of it but to shew its course."

Curia adv. vult.

And now the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the pleadings; "On the part of the *defendant* it has been contended, that under the grant by *Robert Stansfield* to *Jeremy Marshall*, his heirs and assigns the *defendant*, as the assignee of *Marshall*, has a right to make the sough pits as being necessary to keep the sough in repair, as incident to the grant of the sough, and as it is necessary to open the sough pits as often as the repair of the sough requires. For the *plaintiff* it has been contended that the liberty of making and opening a sough pit, has been granted but for once, and not as often as the sough requires repair; and in addition to this it has been contended that the sough itself is not to be continued, or rather the use of the pit for the repair of the sough, except as far as it is necessary to drain *Jeremy Marshall*'s woody ground. In the grant

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it is not particularly mentioned, for what time it is to be continued; but, as there is a grant of the sough, without regard to the ground under which it might be granted, the question is whether, under the terms of the grant, the grantee had a right to do that which was necessary to repair the object of the grant so long as it continues, or being once made, it should continue no longer than it remains unimpaired by time or accident. Such latter construction would defeat the views of one intending to open a colliery. It has been observed, that it would have been mentioned, if it had been intended to give a liberty of repairing the sough in perpetuity; but this does not furnish any argument against the right of repair. The purpose for which the liberty was given is expressed for the more safe and easy carrying up of the tail of the sough. That purpose once answered should it be continued afterwards? The sough may be continued, it is said, but not so easily without the sough pits, and if so, he is not entitled to make these pits. It is indeed reasonable that he should not make other pits unless absolutely necessary; there is therefore, nothing in this part of the grant which relates to the making the two little sough pits, nor in the covenant to repair the fences which furnishes an argument upon the question, whether *Marshall* had, as incident to the grant, any right to repair the sough. The covenant is, for the benefit of the grantor, in other respects not connected with the sough. "There is therefore nothing in the deed to narrow the grant, and the question resolves itself into whether the right of repair is incident to the grant?" Upon this question his lordship thought that the cases cited for the *defendant* were conclusive, and therefore observing that it was admitted that all the coals were not got out of the woody land."

JUDGMENT for the DEFENDANT.

TOMS *against* POWELL.—*June 17th.*

Practice. Latitat. Costs.

Where **plaintiff** ***issued a*** **latitat** ***which was not returned, then*** **alias** ***and*** **pluries,** ***and, before service, but after the issuing of the last writ, the*** **defendant** ***paid the debt, but not the costs; held that the*** **plaintiff** ***might proceed to recover costs, the action being commenced, either by the latitat, or the*** **pluries,** ***&c. before payment.***

TOMS *versus* POWELL.

IN an action for goods sold and delivered, tried before *Heath*, J. at the last assizes for *Surrey*, the *defendant* admitted 6l. 10s. 11d. to be due, and the question was, whether it was not paid before the suit commenced. The *plaintiff* sued out his first writ 22d *June*, 1805, his second writ, which was an alias, 22d *June*, and an *alias pluries*, *August* 20th, returnable *Michaelmas term*. After the last writ was issued, the *defendant* paid the debt, without the costs, and no mention was made of the costs, the writ not having been then served. There was a verdict for the *plaintiff* with nominal damages and liberty to enter a nonsuit, if the court should be of opinion with the *defendant*. The first writ to found the *alias* and *pluries* had never been returned. No writ was served till the *alias pluries*, and the debt was paid 11 days previous to the service of it.

BOWEN obtained a rule to shew cause why a nonsuit should not be entered, and cited *Harris* q.t. v. *Woolford*,* to shew the necessity of proving the return as well as the issuing of the first writ, as in the case of replying to save the statute of limitations. He contended also, that, nothing being said about the costs, at the time of paying the debt, it amounted to a waiver

* 6 *Term Rep.* 617.

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of the costs. The rule was granted only on the first ground; for the court said that the latter point was not a defence to the action though it might have induced the court to have staid the proceedings.

LAWES, for the *plaintiff*, shewed cause and contended "that the *pluries* was issued before the payment of the money, and was either to be considered as the commencement of the suit, or else the irregularity of the want of returning the first writ was waived by appearance."

LAWRENCE, J. "Should not the *defendant* have moved to set aside the proceedings, for irregularity? The cases requiring the latitat to be returned, have been where it is necessary to shew a suit commenced by the *latitat* itself; but that goes to shew the commencement of the action is by the *alias*; for, if not, it could not shew that the action is not in time."

GROSE, J. "The *defendant* should have moved to stay proceedings."

LE BLANC. "The motion when it was made was founded on the case of *Harris* v. *Woolford*, but that case was, where it was necessary to connect the *latitat* with the *alias* in order to shew the suit commenced by the *latitat*; of course it goes to shew that it is commenced by the *pluries*, if the latitat is not returned, and that was before payment of the debt."

The KING *against* the Justices of STAFFORDSHIRE.

The statute 9 Geo. I. *c.* 7, *s.* 8, *is peremptory upon the justices to hear an appeal, and it cannot be dismissed on the ground, that notice has not been given to the respondents.*

Stat. 9 Geo. I. c. 7, s. 8. Appeal.

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The KING *versus* The Justices of STAFFORDSHIRE.

MANDAMUS to the justices of *Staffordshire* to receive and enter a continuance on an appeal against an order of removal, till the next general quarter sessions, and there to hear and determine the same was applied for, by

CLIFFORD, who stated that an "appeal had been entered the next sessions after the order, but notice had not been given to the respondents. The justices thinking there had been time for such notice dismissed the appeal."

On moving to make his rule absolute he stated that the statute 9 *Geo. I.* c. 7, s. 8, had been variously construed. In the *King* v. the *North-riding of Yorkshire*, it was thought to be discretionary to respite the appeal for want of notice, that in the case of the *King* v. *Buckinghamshire*, it was held to the contrary. It was now thought to be peremptory.

Sir V. GIBBS, therefore, made no objection, the opinion of the court being clearly with the decision in the case of the *King* v. *Buckinghamshire*.

RULE ABSOLUTE for a MANDAMUS.

ROBERTSON *against* PATTERSON.—*June 6th.*

Stat. 23 Geo. III. c. 23, s. 22, Bail. Exoneretur. Seaman.

Where a seafaring man is arrested for a debt of less than 20*l. and has given bail, and is afterwards impressed into his majesty's service, the bail by the equity of the statute* 23 Geo. III. c. 33. s. 22, *are entitled to have an* exoneretur *entered, if they be not indemnified, and the impress is without collusion.*

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THIS was a rule calling upon the *plaintiff* to shew cause why an exoneretur should not be entered upon the bail piece. The principal was arrested for a debt of 19*l.* and bailed, and was afterwards impressed into his majesty's service. An application was then

made to this court for a writ of *habeas corpus*, that he might be surrendered into court, and then remitted to the custody of the commander to whose ship he belonged, and the bail be thereby discharged. That motion was, however, rejected; LAWRENCE, J. suggesting, that, if the bail were entitled to have the man brought into court merely to be surrendered and then sent back, they might as well apply to the court to be discharged, on the ground of their not being able to surrender him, for that the theatrical exhibition of the person of the *defendant* in court could be of no real service, and it might as well be effected without the aid of such a useless farce. The present rule was therefore obtained.

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LAWES now shewed cause. "The bail stipulate, at all events, that the principal shall render or pay the damages; there is no qualification to their undertaking. This has been assimilated to the cases under the alien act; but there it is uncertain whether the *defendant* will ever return. Here, the bail must always have known that the *defendant* was liable to be taken away, by being impressed, as well as that he might voluntarily secrete himself or run away. *Non constat* but he may be at large before proceedings are had against the bail. They should shew an extreme case of hardship before they are entitled to indulgence; they knew he was liable to be impressed, for he was mate of a fishing smack."

Lord ELLENBOROUGH, C. J. "Is there not a case of surrendering a man who was insane?"

LAWRENCE, J. "The court refused in that case; the ground of the application is that if the *defendant* had been in the service of his majesty, before this action he would not be liable to be arrested. On any act of his own this motion could not be founded."

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Lord ELLENBOROUGH, C. J. "The distinction is taken in the case of the alien act, that *lex neminifacit injuriam*, the party being sent out of the kingdom by act of law."

LAWES. "Those cases are settled in *Merrick* v. *Vaucher*.*

LAWRENCE, J. "Suppose he were now at large, and to be surrendered by the bail could he not be discharged immediately."

LAWES then relied upon a part of the affidavit from which he inferred that the bail were indemnified, and on that ground contended that the bail could not be entitled to relief.

Sir VICARY GIBBS and ESPINASSE relied upon the general principle above suggested, and the statute 32 *Geo. III.* c. 33, and cited *Bond* v. *Isaacs*,† where the *defendant* was surrendered and then immediately turned over to the keeper of the *Savoy*.

LE BLANC, J. "Suppose a man enters voluntarily."

LAWES. "It is very easy to procure a man to be impressed."

LE BLANC, J. "It would be an answer to the application to have shewn that the bail procured the impressing of their principal themselves."

Lord ELLENBOROUGH, C. J. "Has the crown a right to detain him after being arrested, and that against the rights of the parties? That is one of the difficulties which occur to me." Afterwards, upon looking into the statute, his lordship said, "It stands thus, the immediate right of the party to hold the person

* 6 *Term Rep.* 5051. † 1 *Burr.* 339.

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of the *defendant* is suspended; the bail are put in his place; there was a right to arrest him at the time; afterwards the crown interferes and acquires a positive right to his person. And by 23 *Geo. III.* c. 33, s. 22, no petty officer or seaman shall be liable to be taken out of his majesty's ships of war by any process otherwise than for a criminal offence, unless for a real debt contracted, by him before he belonged to his majesty's service, and unless the *plaintiff*, &c. shall make affidavit, &c. that the debt or damages amounts to 20*l.* at the least, a memorandum of which shall be marked on the process." And, if such person is arrested, a judge is to discharge him and give costs of the arrest. The question is, therefore, "whether any execution of ours shall defeat that provision, and whether the bail are in a situation to take him; which they are not, for, by the act of law another person has acquired a right to his person."

The court, therefore, agreed that the bail were entitled to be discharged unless they were indemnified, in which case they could not be injured. An affidavit was required as to this point, and it appearing that they were not indemnified.

The RULE was made ABSOLUTE.

SEDGEWICK *against* ALLERTON.—*June* 18.

Practice. Plea.

Where a summons is obtained for time to plead and indorsed, the defendant must draw up and serve the order, or it will be null, and the plaintiff may sign judgment.

SEDGEWICK *versus* ALLERTON

RULE to shew cause why an interlocutory judgment should not be set aside for irregularity. Declaration was delivered the 16th of *May*, and before the time for pleading expired, the *defendant* took out a summons for time to plead, which the *plaintiff*'s attor-

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BEDGEWICK *versus* ALLERTON.

ney indorsed for eight days; within that time, no order being drawn up, the *plaintiff* signed judgment, and afterwards, but still within the time allowed by the indorsement of the summons, the *defendant* pleaded the statute of limitations."

PARK shewed cause and contended that it was not necessary to draw up the order."

But, BY THE COURT, without drawing up and serving the order, the summons and indorsement was to be considered as a nullity. It is necessary to prevent mistakes as to the terms agreed upon.

It afterwards appeared that the *defendant* was entitled to an imparlance, even without the taking out a summons, and upon that ground the rule was made

ABSOLUTE.

STRACHEY and GILES *against* TURLEY, BURT and Others.

Stat. 28 Geo. III. c. 52. Petition in Parliament. Costs.

Two several petitions were presented against the return of a member for G. which, being referred to a committee, were pronounced each frivolous, held that the costs could not be taxed jointly under 28 Geo. III. *c.* 52.

STRACHEY *versus* TURLEY And Others.

THIS was an action of debt in which the *plaintiffs* declared that the *defendants* were indebted to them in 131. 2s. 6d. by virtue of the statute 28 *Geo. III.* c. 52, entitled an act for the further regulation of the trials of controverted elections or returns of members to serve in parliament; to which the *defendants* pleaded *nil debent*. There was a similar action by the same *plaintiffs* for the like sum against *Frost*, with the like plea; and a third similar action by the *plaintiffs* against *Frost* and *Turley*, and the other *defendants* named in the first action for 679l. 19s. 10d.

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with the like plea; these actions were tried before Lord ELLENBOROUGH, C. J. at the sittings at *Westminster* after *Michaelmas term* 1805, when a verdict was given for the *plaintiffs*, in each cause, for the respective sums therein demanded, subject to the opinion of the court on the following case: At the last general election, Sir *Henry Strachey*, Mr. *Giles*, and Mr. *Frost* were candidates for the borough of *East Grinsted* in *Sussex*, and the two former were returned duly elected. On the 29th of *November*, 1802. A petition was presented to the House of Commons, signed by Mr. *Frost* alone, and not by any of the other *defendants*, complaining of that election and return; which petition stated, that at the last election for the borough of *East Grinsted*, &c. on the 7th of *July* last, the petitioner, Sir *Henry Strachey*, and Mr. *Giles*, were candidates to represent the same in parliament. That the right of voting is in the inhabitants paying *scot* and *lot*, and the freeholders of the borough. That G. B. the bailiff acted as returning officer for the town and borough aforesaid, with gross partiality, &c. that a considerable shew of hands appeared in favour of the petitioner; yet that G. B. declared the shew of hands to have been in favour of Sir *H. S.* and Mr. *Giles*; and on a poll being demanded, &c. and taken before the said bailiff, a majority of legal votes was polled for, or tendered in favour of the petitioner, over the said Sir *H. S.* and Mr. *G.*, and the petitioner was duly elected and ought to have been returned one of the burgesses, &c. but that the bailiff admitted several illegal votes in favour of Sir *H. S.* and Mr. *G.* and rejected many legal votes tendered in favour of the petitioner, and returned Sir *H. S.* and Mr. *G.* as duly elected, &c. And after alleging corrupt practices against the sitting members, it concluded with praying that the house would take the premises into

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STRACHEY *qui tam* TURLEY and Others.

consideration and grant him relief, &c. and Mr. *Frost* entered into a recognizance to the king in 200l. with two sureties in 100l. each to appear before the House of Commons at the time fixed by the house for taking his petition into consideration; and also to appear before any select committee appointed for the trial of the same, &c. The House of Commons ordered this petition to be taken into consideration, upon the 8th of *February*. On the 1st of *December*, 1802, a petition was presented to the house, signed by *J Burt* and *J. Turley* and the other *defendants* in the first action, and several others, stating in like manner the constitution of the borough and right of voting therein, and alleging partiality, &c. in the returning officer; and that he permitted many persons to vote who had no right, and rejected the votes of the petitioners and others who were duly qualified to vote, &c. and praying relief in the premises; and *J. Burt* (one of the *defendants*), entered into such recognizance for the trial of the same petition as is by law required, in 260l. with two sureties in 100l. each. Mr. *Frost* did not sign this petition; the House of Commons ordered this petition to be taken into consideration, at the same time with the petition of Mr. *Frost*, and the select committee was duly ballotted and appointed on the 17th of *March*, 1803, for trying and determining the merits of both parties. On the 4th of *April*, 1803, the chairman of the committee reported to the House that the said committee had determined, that Sir *H. S.* Bart. and *D. Giles*, Esq. were duly elected burgesses to serve for the said borough, and that the petition of *J. Turley*, *J. Burt*, &c. were frivolous and vexatious. These determinations were entered on the journals of the house, and an examined copy of such entry was produced in evidence. On the 15th of *June*, 1804, the speaker signed the following certifi-

cate which was produced in evidence; "Whereas *N. Smith*, Esq. one of the masters of the high court of Chancery, *J. H. Ley*, Esq. clerk assistant of the House of Commons, who were duly authorized and directed by me according to the statute 28 *Geo. III.* entitled, &c. to examine and tax the costs and expences of Sir *S. H.* Bart. and *D. Giles*, Esq. incurred by them in opposing the petition of *J. Frost*, Esq. and also in opposing the petition of several persons in behalf of themselves and others, electors of *East Grinsted*, &c. presented to the House of Commons, complaining of an undue election and return of them the said Sir *H. S.* Bart. and *D. G.* Esq. as burgesses, &c. have reported to me the amount of such costs and expences. Now I do hereby certify that the said costs and expences allowed in the said report amount to 706l. 3s. 10d. Dated 15th of *June*, 1804, (and signed) *Charles Abbot*, Speaker. A copy of this certificate was served upon the *defendant Frost*, and payment of the costs therein certified to be due was demanded of and refused by him. On the 7th of *May*, 1805, the *plaintiffs* made a further application to the speaker to ascertain how much of the costs and expences allowed in the certificate amounting to 706l. 3s. 10d. was incurred by the *plaintiffs* in opposing the said two petitions as they were jointly prosecuted, and how much thereof was incurred by them in opposing each of the said petitions separately prosecuted, who thereupon granted the following certificate, which was produced in evidence: "Whereas *N. Smith*, Esq. one of the masters, &c. and *J. H. Ley*, Esq. assistant, &c. who were duly authorized and directed by me, according to the statute 28 *Geo. III.* entitled, &c. to examine and ascertain how much of the costs and expences allowed by them in their report to me, dated the 12th of *June* last, was incurred by Sir *H. S.* Bart. and *D. G.* Esq.

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STRAGNELL verus TURLEY and Others.

of either of them, in opposing the petition of *J. Frost*, Esq. and also the petition of several persons whose names thereunto subscribed on behalf of themselves and others the electors of the borough of *East Grinsted*, &c. severally complaining of an undue election and return of them the said Sir *H. S.* and *D. G.* for the said borough of *East Grinsted*, as the said two petitions were jointly prosecuted, and how much thereof was incurred by them or either of them in opposing each of the said two petitions as separately prosecuted, have made their report to me thereupon. Now I do hereby certify conformably to the said last mentioned report, that the costs and expences incurred by the said Sir *H. S.* and *D. G.* in opposing the petition of *J. F.* separately prosecuted amount to 13l. 2s. and in opposing the petition of the several electors of the Borough of *East Grinsted* aforesaid, separately prosecuted amount to 13l. 2s.; and that the expences of the said Sir *H. S.* and *D. G.* in opposing the said two petitions jointly prosecuted amount to 679l. 19s. 10d. which said three last mentioned sums make up the sum of 706l. 3s. 10d. as allowed in the said former report made to me on the 12th of *June* last, and certified by me on the 15th of *June* last accordingly. Dated 15th of *June*, 1805, (Signed) *Charles Abbott*, Speaker. Payment of these several costs was respectively demanded of and refused by the *defendants*. Whereuponthese three actions were brought, one against *Turley* and others the *defendants* in the first action, for 13l. 2s. in which action *Frost* is not a *defendant*; one against *Frost* for 13l. 2s; and the third against *Frost*, *Turley*, and others, for 670l. 19s. 10d. The question for the opinion of the court, was whether the *plaintiffs* were entitled to recover in all or any of the said actions? If in all, then the verdict to stand, if not in all, but only two or one, in such two or one, if not

entitled to recover in all or any, nonsuits to be entered accordingly.

WOOD, for the *plaintiff*. At the time of the trial two objections were made, first, that the costs could not be taxed jointly; secondly, as the speaker had made one certificate there was an end of his authority and he could not make another. This action is founded on the statute 28 *Geo.* III. c. 52, s. 18, which refers to two former acts; statute 10 *Geo.* III. c. 16, and 11 *Geo.* III. c. 42; and the 28 *Geo.* III. c. 52, s. 19, provides that whenever any committee shall report to the house, that a petition is frivolous and vexatious, the party against whom the petition isshall recover from the parties who signed the petition or any of them, such costs as he incurred in opposing the same. Such costs are to be taxed by the speaker under s. 22, which is as follows: "that in the several cases before mentioned, the costs and expences of prosecuting or opposing any such petition shall be thus ascertained; that on application to the speaker by any petitioner or petitioners, &c. for ascertaining such costs and expences he shall direct the same to be taxed by two persons, who are thereby required to examine the same, and report the amount thereof to the speaker, who shall, on application, deliver to the party or parties a certificate signed by himself, expressing the amount of the costs and expences allowed in such report, &c." These costs if not paid may be recovered by action of debt.* And in section 24 it is enacted that "in every case where the amount of such costs and expences shall have been so recovered from any person or persons, it shall and may be lawful for such person or persons to recover in like manner from the other persons or any of them,

* S. 22.

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if such there shall be, who shall be liable to the payment of the said costs and expences a proportionable share thereof according to the number of persons so liable. The committee being appointed to try both of these petitions together they became one joint and consolidated petition; and all the parties who signed the petition became jointly liable to the costs. For there can only be under the acts, one trial, and they must be tried together."

Lord ELLENBOROUGH, C. J. "Suppose there is one petition upon the ground of bribery and another which contains only one concise point upon one short fact, such as that the party who is returned is not of age; should the costs be joint?"

LAWRENCE, J. "There might be one interest and yet two separate petitions. There may be a return, and one may wish to set it aside on the ground of bribery, which may lead to very great length of evidence, and great expense, and the other takes some such short ground as that of *non-age*. Suppose the committee holds the one to be frivolous, and the other frivolous must there, because there is one committee and one trial be joint costs?"

Lord ELLENBOROUGH, C. J. "I do not see how you can get over the obstacle of the words being all in the singular number 'petition,' and not 'petitions.'"

WOOD then cited *Comp.* 192. where the word bailiff in the singular number was held to apply to the bailiffs being the returning officers. And he mentioned the practice of the House of Commons on petitions to be in favour of the *plaintiff*'s claim.

THE COURT held that there the plain sense might lead to such a construction but here it was otherwise. They said also that if the *plaintiff* had judgment for the

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two separate actions for 13l. 2s. he would be barred in an action to be brought against the same parties on a better certificate, and advised WOOD to consider whether he would take a nonsuit in one or all of the actions. They said they must put the best construction they could upon the acts without regard to the practice of the House of Commons.

A NONSUIT entered in all the ACTIONS.

The KING *against* the Inhabitants of LEIGH.—

Settlement. Hiring and Service.

A pauper hired for a year ending 31st of March, *goes on the 25th of* March *with leave of his master, to a* mop *or statute for hiring of servants, in order to get a place at the end of his service, and returning early in the morning of the 26th, the master turns him away, offering him less than his wages; the pauper on the next day summons the master before a magistrate, who orders the master verbally to deduct 2s. 6d. from his whole wages; the pauper goes into another service, and is shortly after paid his whole year's wages. Held that the pauper gains no settlement during his service with the first master.*

The KING *versus* the Inhabitants of LEIGH.

TWO justices, by their order, removed *John Brazier*, *Hannah* his wife and their four children by name from the parish of *Leigh* in the county of *Worcester* to the parish of *Clifton on Team* in the said county. The sessions on appeal quashed the order subject to the opinion of the court of *King's Bench* on the following case: The pauper *John Brazier* being legally settled in the parish of *Clifton on Team* on 31st day of *March*, in the year 1795, hired himself a servant in husbandry for a year to *Samuel Jones* of the parish of *Lulesby*, and agreed for 6l. 10s. for the year's service. The pauper resided at *Lulesby* in the service of the said *Samuel Jones* from thence until the 25th day of *March*, 1796, upon which day, by per-

1826.

The King versus the Inhabitants of Lurgh.

mission of his master and for the purpose of seeking a new service for the ensuing year went to the mop at *Bromyard*, the mop being a meeting for the purpose of hiring servants, and *Bromyard* being six miles distant from *Lulesley*. The pauper did not return to his master's house till three o'clock on the morning of the 26th of *March*, when he came home with some ribbands in his hat which he had purchased. In the course of the morning of the 26th, his master came to him and observed he supposed masters were scarce at the mop, and that he had enlisted for a soldier, and told the pauper he should stop no longer in his service. The pauper told his master he had not enlisted which was the fact, and that he wished to stop his year out; but the master said he would not keep the pauper any longer in his service, and the pauper should stop no longer, and at the same time, offered the pauper his wages for the time he had served, something less than 6*l.* 10*s.* which the pauper refused to accept. The pauper said he would have accepted the full year's wages if tendered to him by his master, but that he had rather have staid out his year. The pauper left his master's house immediately in consequence of what had passed and never returned to it. On the next day, the 27th of *March*, a summons having been taken out by the pauper against his master, they both appeared before a justice of the peace for the said county, upon which occasion the pauper applied to the magistrate to direct his master either to receive him into his service for the remainder of the year, or to pay him his whole year's wages, and the magistrate verbally directed half a crown to be deducted from the whole year's wages and retained by the master. The pauper on the same 27th of *March* hired himself as a servant to Mr. *Smith* of *Broadway*, and upon that day entered upon such service. About a week after the pauper went to his former master Mr. *Jones* for his wages; who paid

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The KING *versus* the Inhabitants of LEIGH.

the full sum of 6l. 10s. Mr. *Jones* some days afterwards applied for a return of the half crown directed by the magistrate to be deducted, but the same was never returned to Mr. *Jones*. The sessions being of opinion that the pauper under the circumstances above stated had gained a settlement in *Lulesby* by hiring and service for a year with *Samuel Jones*, quashed the order. The question for the opinion of the court is whether under the circumstances above stated, the pauper served a year with *Samuel Jones* so as to gain a settlement in *Lulesby*; if the court is of opinion that the pauper gained a settlement in *Lulesby*, then the order of sessions is to be affirmed, but if the court is of opinion that the pauper did not gain a settlement in *Lulesby*, then the order of sessions to be quashed, and the original order to be affirmed.

PULLER, in support of the order of sessions, referred to the cases of the *King* v. the *Inhabitants of King's Pyon*,* the *King* v. the *Inhabitants of Sudbrooke*,† and endeavoured to distinguish them from this case. Here was a hiring and service during the year, with a dispensation of the contract. The sessions were much influenced by their opinion of the fraudulent nature of the conduct of the master, in endeavouring to deprive the servant of his settlement. The master having thought it reasonable that he should go to the mop, could not on the next day retract, and turn him away on that account. He cited also the case of *Eastland* v. *West Horsley*.‡

THE COURT held that the contract was put an end to by the servant upon reference to the magistrate, and that the case of *Rex* v. *King's Pyon* was almost in terms with this.

LE BLANC, J. "If there was any fraud the magistrate must have been a party to it."

ORDER OF SESSIONS QUASHED.

* *Smith's Rep.* 51. † *Ibid.* 55. ‡ *Stra.* 526.

1806.

The King *against* the Bishop of Oxford — *June 2d.*

Simony. Tythes. Mandamus.

The inhabitants of P. having, by endowment and an ancient deed, the right of appointing a curate who is entitled, besides a salary, to the receipt of vicarial tythes, an inclosure act is passed, reciting that it is matter of doubt whether the curate is entitled to small tithes or to a modus in lieu thereof, which question is left unsettled by the act; the inhabitants four years afterwards present a curate, with whom they enter into an agreement signed by him and the inhabitants, stating his appointment, and that he is entitled to the "payment of 40l. 8s. 2d. annually, payable out of the lands and hereditaments at P. in right of the said curacy, together with surplice fees, and all other profits, privileges, and appurtenances to the same belonging and of right payable. The inhabitants considering that sum not sufficient, voluntarily agreed to pay a further annual sum of 29l. 11s. 10d.; with a provisoe that it shall not in any respect alter the money payment of 40l. 8s. 2d. wherewith the said funds are, and have been immemorially charged in right of the said church. Held that this agreement gives a benefit to the inhabitants, who make the presentation, inasmuch as it bars the right of the curate to his tythes, and affords evidence in future of a modus, and is therefore simoniacal and void, under the Stat. 31 Eliz. c. 6. s. 5.

The King *versus* Bishop of Oxford.

RULE to shew cause why a mandamus should not issue to the *Bishop of Oxford* to grant a licence to *Isaac Knipe*, clerk, to officiate as chaplain or curate for the chapel or church of *Piddington* in the parish of *Ambrosden*, in the said county, and diocese of *Oxford*. The church was vacated 12 *May* 1801, by the death of the late chaplain or curate, *J. Cockerill*, clerk; upon whose death it was intended with the consent of the bishop to increase the salary of the curate to be advanced from 40l. to 70l. per annum. The affidavits on the part of the prosecution, stated, that from time immemorial there hath been a church or chapel in the township of *Piddington*, in the parish of *Ambrosden* in the county of *Oxford*, and

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within the diocese of the lord bishop of *Oxford*. and that divine service and other ecclesiastical duties have immemorially been performed in the said church, by a chaplain or curate, in priest's orders nominated and appointed by the *inhabitants* of the said *township*, or the major part of them, and that such nomination was confirmed by a certain deed of agreement about the year 1428, between the then vicar of the parish of *Ambrosden*, and the inhabitants of *Piddington*; confirmed by the decretal order of the then diocesan. By which deed it was provided the said inhabitants should have one curate continually, resident in the said township of *Piddington*, chosen as aforesaid, who should at all times thereafter wholly receive all the tythes real or personal, greater, lesser, or small, and all other emoluments and profits, &c.; by what name soever called, due from the inhabitants of the said township to the vicar, in lieu whereof the inhabitants were to pay to the vicar 20s. a year. A meeting of the inhabitants took place on the 9th of *September* following; in order to nominate another curate, when Mr. *Pea - son* having been nominated by a majority of the inhabitants, applied several times to the bishop for a licence, which the latter refused to grant, declaring that he thought it simoniacal. Upon which the inhabitants abandoned the said nomination and appointment of the said Mr. *Pearson*, and afterwards at another meeting, which was numerously attended by the inhabitants; the Reverend *Isaac Knipe* being a clerk in priests orders, was unanimously elected to the curacy of the said township of *Piddington*, who afterwards applied to the bishop for his licence, and was refused. It was further stated, that an action for *simony* commenced in the court of *King's Bench*, against several of the inhabitants in 1802, brought by Mr. *Matthews* (who had been nominated to the

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curacy by the crown,) in which the latter was nominated at *Oxford* in 1803.

The affidavits on the part of the *defendant* stated that in *June*, 1801, when the meeting of the inhabitants took place after the vacancy, the bishop was entirely ignorant of the rights of the curate, and was informed that the salary was a fixed sum of 40*l.* and that it was so settled by the *Piddington* inclosure act. That the bishop under such ignorance of the rights of the curate expressed his approbation of raising the salary to 70*l.* a year. That he afterwards found that the curate of *P.* by an endowment in the year 1428, the curate was entitled to all small tithes, and in consequence thereof, such right was expressly reserved by the aforesaid act of parliament, and that in the survey returned into the exchequer in the time of Queen *Anne* the curacy was valued at 41*l.* 7*s.* 8*d.* and at nearly the same amount as the vicarage of *Ambrosden*. That Mr. *Stokes* the other candidate with Mr. *Pearson* refused to sign the agreement as simoniacal in agreeing to except 70*l.* per annum, in lieu of small tithes, in consequence of which refusal Mr. *Pearson* was nominated without opposition; that the inhabitants afterwards offered to give up the agreement proposing that Mr. *Pearson* should be bound in honour by it; to which the bishop gave his positive negative, saying that he considered it his duty not to licence any person who was not perfectly free to assert his rights. That in consequence of this agreement that the nomination had been simoniacal and void and the right of nomination vested in the king, who nominated the Rev. Mr. *Matthews* on the 1st of *July*, 1803, to whom the bishop granted his licence.

The case was argued by Williams, Serjt. Milles and Manley, in support of the rule, and Sir V. Gibbs and Abbott *è contrà*, when the only question made was,

whether the agreement with the curate made by the inhabitants was simoniacal. 1806.

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Lord ELLENBOROUGH, C. J. " In considering whether this be simoniacal we may look only to the agreement and to the act of parliament; and it is not necessary to state the words of it particularly, but at the time of making it there had been recently before, about four years previous, an agitated question with the parish, not then settled, as to the right to small tythes. When the parish next come to exercise their right of presentation, they bargain with the curate for an advance of salary upon an agreement which is in effect to bar him from exercising his right to claim the tythes, and which as far as respects his successor was to remain as evidence that this was an immemorial payment. The question is then whether this is not a benefit to the party presenting, and if by the agreement the party is barred from making such further claim, there is no doubt that it is a benefit within the statute 31 *Eliz.* c. 6, s. 5, it is therefore simoniacal, and the right of presentation of course devolves to the crown.

The rest of the court concurring with his lordship,

The RULE was discharged with Costs.

GOULD *against* HOLMSTROM.

Bail in error are as no bail if there be an exception against them and the defendant *in error* non prosses *the writ of error for want of justification. He therefore cannot proceed against them.* Bail. Error. Practice.

RULE to shew cause why an exoneretur should not be entered on the bail piece of the bail in error, and proceedings against them be staid. Judgment in the original action against the *defendant Holmstrom,*

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GOULD versus HOLMSTROM.

at the suit of *Gould* was obtained in *Trinity term* last, the bail in that action were one *Ford* and one *Engstrom*. A writ of error was sued out the 16th of *July*, 1805, and on the 20th of *July*, *Daniel Pitt* and *Thomas Gerrard*, were put in as bail. On the 24th a rule for better bail was served which operates as an exception to the bail, they gave notice to justify, as in the next term *Michaelmas* 1805, and on the 20th of *January* no further proceedings being had, the writ of error was nonprossed for want of justification of bail. The question was whether the *plaintiff* had not a right to proceed against the bail.

PARK and BOWEN shewed cause and cited *Jones* v. *Tubb*,* *Fulke* v. *Bourke*,† and *Waller* v. *Green*,‡ and contended that when once bail were put in, they were never exonerated unless better bail were put in.

Sir V. GIBBS, *contrà*. "No bail in error were requisite till the statute 17 *Car. II.* c. 8. s. 3; that statute could not operate as to this cause till *Michaelmas term* when it would appear whether the bail justified, consequently the *plaintiff* was tied up from issuing his execution till then; before the statute he could issue no execution although there were no bail, and the statute requiring that the bail should be such 'as the court should allow of,' the qualification of the words of the statute must be taken, and they were in effect no bail till allowed by the court, and the *plaintiff* having excepted to them should have withdrawn his exception before he proceeded against them."

Lord ELLENBOROUGH, C. J. "I cannot help thinking that by the exception the *plaintiff* considers

* 1 *Wils.* 337. *Sayer*, 58. † 1 *Sr. W. Blac.* 462.
‡ Say. 308.

them as no bail, and has now a right to take out his execution."

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RULE ABSOLUTE.*

THE KING *v.* the INHABITANTS of LOUGHTON.

In order to be discharged from an indictment for not repairing a highway, the parties must produce an affidavit that the road is now actually repaired since the conviction, and is likely to continue so.

Highway. Indictment.

SMITH moved to discharge the *defendants* upon payment of a small fine, from an indictment for not repairing an highway, upon an affidavit that since the conviction, the road was put in good and substantial repair, and a large sum of money expended upon it, and was now in repair. He produced also a certificate of two magistrates that the road was in good repair, and likely to continue so.

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ARBOTT, *contrà* objected that the affidavit did not state that the road was likely to continue in repair, although it was so stated in the certificate of the justices.

SMITH was proceeding to shew from the affidavits, by inference from circumstances, particularly from the words substantial repair, and the sum stated in the opinion of the surveyors to have been laid out, that the affidavit directly implied as much; when he was stopped by

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* N.B. In the last term the court came to a contrary decision with some reluctance, upon the authority of the cases, in this very case; but, having some doubts, it was now argued again, and in consideration of the *plaintiff* having proceeded upon the authority of the cases cited, and the bail having neglected to apply to be struck off the bail piece, the bail were ordered to pay costs up to last term.

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The King versus the Inhabitants of Loughton.

LAWRENCE, J. who said that the affidavit must state in terms that the road is likely to continue in repair.

RULE REFUSED.

WARDELL v. VILLA REAL GOOCH.

Practice. Feme Covert.

Where a married woman has a settlement by deed of separation, and she is trusted by a creditor, knowing her to be married and living separate from her husband, she may nevertheless be discharged upon filing common bail.

WARDELL versus GOOCH.

RULE to shew cause why the *defendant* should not be discharged upon filing common bail, she being a married woman. The *defendant* swore, that her Husband was alive to the best of her knowledge and belief, or at least he was so on the 21st of *April* when the action was commenced, and the *defendant* was arrested. The *plaintiff* used to supply the *defendant* with wine and spirits, and was informed before, that she had a deed of separation, and a separate allowance in 1798 of 250l. a year, by quarterly payments, and that the plaintiff either went with her to receive it, or received it for her.

SIR V. GIBBS shewed cause and contended that the *defendant* should be left to plead her coverture.

Lord ELLENBOROUGH, C. J. "Your representation is that the parties have agreed to consider the case of *Corbet* v. *Poelnitz** as law. It used to be left to a defence upon the plea of coverture; but, now that rule is relaxed. The *plaintiff* dealt with her, knowing her to be a married woman, and thought that she would not take the objection."

RULE ABSOLUTE.

* 1 *Term. Rep.*

Rex v. Hopkins, *Ex parte* Knott.

A woman having the possession of a child for some time, claiming it as her own, was dispossessed of it by artifice; the court granted a Habeas Corpus for the child, against the person who had so obtained possession of it.

Habeas corpus.

The King *versus* Hopkins.

Garrow moved for a *habeas corpus* to the *defendant* to bring up the body of a child, which *Knott* claimed to belong to her, alledging herself to be the mother of it.

It appeared, upon the affidavits, that this was a dispute as to whom the child really belonged, and who was its mother. The affidavits stated the birth of the child, or rather some circumstances from which to infer, that the child was born of Mrs. *Knott*; and it was stated to have been in her possession; and that it was obtained from her by *Hopkins*, by means of artifice.

The Court at first, had some doubt as to whether they could entertain this motion, upon the application of the supposed mother, the father being the only person entitled to the custody of it; but after some consultation,

Lord Ellenborough, C. J. "In this case, it appears that the mother had her child in her care; that Mrs. *Knott* had the child, during the period of nurture in her care, and the possession was then undisturbed; that she was divested of it by an act of stratagem; that she repossessed herself of it again; then, presuming in favour of the party having the possession that she has the right, we think, that in the exercise of our authority to grant the writ, we may grant it to replace the child in the possession of *Knott*; leaving it to the court of chancery to settle,

1806.

The KING versus HOPKINS.

afterwards, according to law, in whose possession it ought to be. We think, the long possession of the child, authorizes us to grant the writ.*"

* There was some doubt as to whether the rule should be absolute in the first instance, as it might be a question, who was the mother; and *Hopkins* might return that it was her legitimate child, and might claim the possession. It was at length settled that the rule should be absolute, in the first instance, and that any claim to the possession might be returned upon the *habeas corpus*. This was afterwards done in Michaelmas term 1806, and the child remanded into the possession of *Hopkins*. The circumstances of the case were very extraordinary.

END OF VOL. III.

AN

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ACTION UPON THE CASE.

The sugar coopers claimed a right to go upon the West India docks, as they would have gone upon the old legal quays, to cooper sugars belonging to private merchants warehoused there; and brought case against the proprietors, for excluding them from exercising their trade. Upon which a special verdict was found. Held, that no judgment could be given, *pro defectu veredicti*, in not stating precisely what legal right the plaintiffs had to go on the legal quays, in place of which, for certain purposes the docks were erected; it only stating that the plaintiffs were used to cooper sugars for shipment for exportation there, which might be by contract with the owners of such quays: and if to a certain or any extent, such right of going on the quays and the docks might arise *ex necessitate*, no such necessity was stated in the verdict: it omitting to state what casks were there, requiring necessary cooperage to be done upon the wharf. For it is clear the docks are not to be used as the cooper's

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1 Where a sheriff's officer was written to by the plaintiff's attorney to execute the process and receive the debt and costs, and he did so, and paid the debt to him but there was a dispute, between him and the plaintiff's attorney, as to the costs; held, the plaintiff's attorney could not proceed upon the bail bond for the costs; the debt and costs being paid to his agent. *Jones* v. *Burton*, *E.* 48 *Geo.* 3. 453

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2 Sugars were sold by auction, by a broker according to a certain catalogue, which did not contain the entire particulars or conditions of sale; the conditions or very material parts of them, were written on a separate paper and read by the broker at the sale, and laid by him on the desk with the catalogue; the catalogue was entitled only "a catalogue of sugars, to be sold 20th September, for particulars apply, &c.;" the conditions were entitled conditions of sugar sale, 20th September, but there were no direct words of reference to either in the one or the other, and they were not pinned together; at the time of the sale the broker's clerk wrote a memorandum of the name of the purchaser, (the defendant) against the article sold with the price; and samples of about half a pound each, were delivered, which were calculated on the weight of the commodity: held that, although the broker must be considered as the agent of both parties, yet as the catalogue did not contain all the conditions of sale, and the conditions were chiefly on a separate paper, the memorandum was not a memorandum in writing, within the statute of frauds; but, by the delivery of the sample, the case was taken out of the statute, for, although a sample is a thing delivered *alio intuitu*, and not principally as a part performance of the contract, yet, where it is a part of the commodity and taken in the weight or measure, it may also operate to comply with the terms of the exception in the statute. Sales by auction of goods are not to be considered as excepted, by the equity of the statute of frauds. *Hinde* v. *Whitehouse*, T. 46 *Geo.* 3. 528

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1 A contract with an advertising taylor for four suits a year, and to return the old suits, is not proveable under a count for goods sold; it is a special assumpsit.

Semble. It includes a contract for mending the suits. *Rees* v. *Manners*, M. 26 G. 3. 118

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2 On a *quantum meruit* for work and labour, the defendant may give evidence that the work was not done well; and need not be put to his cross action.

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AUCTION.

1 A. purchases, at a sale by auction, a lot described in the particulars of sale, as eleven houses, No. 1, 2, 3, &c. situate, &c. and it is stated that "the estate is held by lease of B.:" previous to the lease a small part of the

of No. 2, is subtracted from the possession of the lessee; but the lease, nevertheless, contains a description and plan, in the margin, of the whole ground plot, including that part. Held, that although in equity B. should not be entitled to enforce the covenants in the lease as to that part of the ground, yet that the particulars of sale being with reference to the lease, without an exception of the plot subtracted from the possession; A. the purchaser is entitled to call upon the vendor to complete his purchase, by making a good title to the whole estate contained in the lease, and that an assignment of the lease is not a compliance with the conditions of sale, the vendor not being able to convey the above-mentioned small plot of ground. *Tomkins* v. *White*, *T.* 46 *Geo.* 3. 435

2 Sugars were sold by auction, by a broker according to a certain catalogue, which did not contain the entire particulars or conditions of sale; the conditions or very material parts of them, were written on a separate paper and read by the broker at the sale, and laid by him on the desk with the catalogue, the catalogue was entitled only "a catalogue of sugars, to be sold 20th September, for particulars apply, &c.; the conditions were entitled conditions of sugar sale, 20th September, but there were no direct words of reference to either in the one or the other, and they were not pinned together; at the time of the sale the broker's clerk wrote a memorandum of the name of the purchaser (the defendant) against the article sold with the price and samples, of about half a pound each, were delivered, which were calculated on the weight of the commodity: Held, that, although the broker must be considered as the agent of both parties, yet as the catalogue did not contain all the conditions of sale, and the conditions were chiefly on a separate paper, the memorandum was not a memorandum in writing within the statute of frauds; but, by the delivery of the sample, the case was taken out of the statute, for although a sample is a thing delivered *alio intuitu*, and not principally as a part performance of the contract, yet, where it is a part of the commodity and taken in the weight or measure, it may also operate to comply with the terms of the exception in the statute. Sales by auction of goods are not to be considered as excepted, by the equity of the statute of frauds. *Hinde* v. *Whitehouse*, *T.* 46 *Geo.* 3. 528

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AWARD.

Where a submission to arbitration is of several specific things, so that the said award be made in writing by a certain day, or of the premises, or other words equivalent to a condition, the arbitrators must award, specifically, concerning the things so mentioned, without further notice, or the award is bad for the whole, and no attachment can be obtained for the non-performance of it. *Randall* v. *Randall*, *M.* 46 *Geo.* 3. 90

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BANKRUPT.

1 A bankrupt was a prisoner in the Fleet, for a greater sum than 1,500l. on the 1st of January, 1804; part of it was for a debt due to a creditor, who was allowed, by the Lord Chancellor, till the first dividend, to elect whether he would proceed at law, or under the commission, and before the 1st January 1804, that creditor signed his commission, and afterwards, in January, 1805, by consent a judge's order was obtained to discharge him out of custody *pro tanto*, by which the debts wherewith he was charged were reduced to less than 1,500l. Held that the prisoner was legally in custody on the 1st of January, 1804, for more than 1,500l. and not entitled to the benefit of the insolvent act, 44 *Geo. III.* c. 108.

Semble, a judge will not discharge a defendant out of execution, upon the plaintiff having signed his certificate, without the consent of parties. *Ex parte King*, *M.* 46 *Geo.* 3. 115

2 To an action on a promissory note given to an uncertificated bankrupt after

the commission issued, the defendant pleaded the bankruptcy of the plaintiff, and the commissioners' assignment: and that the assignees demanded payment of him; the plaintiff replied that there had been no new assignment to the assignees, after the making of the note, and that the defendant treated with the plaintiff as one capable of contracting personally. Held, on demurrer, that the demand by the assignees vested the right in them, that a new assignment of personal property was not necessary, and that the mode of contracting was immaterial. *Hitchen* v. *Bartsch*, *M.* 46 *Geo.* 3. 58

3 Action of covenant by the assignee of an insolvent debtor, under the 41 *Geo. III.* c. 70, on a covenant with the latter to pay him 120l. on the death of A. B. The defendant pleaded an assignment thereof by way of mortgage for 61l. to C. previous to the assignment to the plaintiff, which mortgage became forfeited, and that C. gave notice thereof to the defendant. He also pleaded, that before the assignment Jones became indebted in 100l. and was a bankrupt, and that a commission issued, and that the insolvent was found a bankrupt, and his effects were assigned, &c. Replication, that the sum due on the covenant exceeded the sum in the mortgage; and to the plea of bankruptcy, the plaintiff, admitting the commission and the finding of the commissioners, and their assignment, traversed the residue of the plea. Held, upon general demurrer to the former plea, and special demurrer, for the multifarious traverse, to the latter, that the plaintiff might recover the surplus of the money due beyond the mortgage, and also, that the residue of the plea of bankruptcy made but one point of defence, and might well be put in issue together. *Lane* v. *Chandler*, *M.* 46 *Geo.* 3. 77

4 Quere. Whether if a trader depart from his dwelling-house with a clear intent to delay creditors, it be not an act of bankruptcy, although no creditor be delayed. See statute 1 Jac. I. c. 15. *Robertson* v. *Liesked*, *E.* 46 *Geo.* 3. 347

5 Where the assignees of a bankrupt, who was possessed of a term, merely, put the same up to auction, to ascertain whether it was of value, without giving themselves out to be the proprietors, and, there being no bidders, interfered no farther in the matter, and never received rents; held, that they were not answerable in covenant to the lessor. *Turner* v. *Richardson and Retheram, assignees of Barber*, *E.* 46 *Geo.* 3. 330

6 Where money belonging to a bankrupt was, after a secret act of bankruptcy, attached in the hands of a garnishee, by the custom of foreign attachments in London, and paid over by him; held, that such receipt of money was not protected by stat. 19 Geo. c. 32, s. 1, as a receipt of money under compulsion of law; for that statute extends only to payments by the bankrupt himself in the ordinary course of trade, and not to payments by other persons unauthorised by him; and, therefore, the assignees recovered of the person receiving such money, under the foreign attachment, as for money had and received to the use of the bankrupt. *Hevil and Others, Assignees of Wardell (a bankrupt)* v. *Joseph Browning*, *H.* 46 *Geo.* 3. 156

7 A. commits an act of bankruptcy and quits England, having, previous to his act of bankruptcy, become indebted, as indorser of a bill of exchange, to B. which bill is dishonoured and due notice thereof given. In A.'s absence, his wife makes insurances, the broker being still a creditor for the premiums paid by him. B. having sued the drawer and obtained judgment, is induced by A.'s wife to take a bill in part payment indorsed by her for A. and stay execution, upon depositing the policies; which being done a loss happens. This bill not being paid, B. the broker, accepts another for the amount in his favour, upon the policies being delivered to him for A. with the consent of A.'s wife, and having received the money thereon, pays that bill, and deducts in account with A.'s assignees, against whom a commission is issued after such payment; Held, that the assignees could not recover of B.; for A.'s wife, and the broker, were their agents, and they could not take the benefit of the policies, effected by her, without taking the burthen. *Hevil and Others, Assignees of Wardell (a Bankrupt)* v. *Park and Another*, *H.* 46 *Geo.* 3. 164

8 A trader in insolvent circumstances, and under arrest in execution, at the suit of a creditor, assigns all his goods and effects to him, in payment of his debt, with a trust for payment of the

surplus to himself. Held, this is in contemplation of bankruptcy and fraudulent within the stat. 1 Jac. I. c. 15, s. 2, notwithstanding the compulsion of the arrest. *Newton* v. *Chantler*, *H.* 46 *Geo.* 3. 137

9 A. draws a bill of exchange on B. and indorses to C. who indorses to D. for a good consideration; B. accepts but does not pay; after the bill is due, A. becomes bankrupt; Held that this is within the words of the statute 7 Geo. I. c. 31, and may be proved under A.'s commission.

Q. Whether it be *debitum in presenti solvendum in futuro*.

Semble, it is a credit given for the security of a bill of exchange to one who becomes bankrupt, and therefore within the express words of the statute. *Sturey* v. *Barnes*, *E.* 46 *Geo.* 3. 441

10 A brick-maker in a large way making bricks for sale became by devise tenant for life of the land on which the kiln was worked, and of the earth and soil whereof the bricks were made; held that by such manufacture on his own land he was not a trader within the statutes of bankruptcy. *Sutton* v. *Wheely*, *E.* 46 *Geo.* 3. 445

BILL OF EXCHANGE.

1 Where a captain of a vessel abroad drew upon his owners for provisions supplied for the use of the ship, and before the bill became due or was presented for acceptance settled with them, and at the time of presentation for acceptance, there was nothing due to him; held, that this was not sufficient to dispense with the necessity of notice to him, the drawer, of non-acceptance. *Orr* v *Maginnis*, *E.* 46 *Geo.* 3. 328

2 A bill accepted, payable at a bankers, must be presented for payment before six o'clock, or rather within the usual hours of a banker's shop being open, and proof of presentment afterwards, by a notary, when a boy came to the door, and could give no answer as to the payment, the clerks being gone, was held not to be proof of the dishonour of a bill.

Semble; *pari ratione*, all bills should be presented during the regular business hours of the acceptor, which are variable; and presentment after will not entitle the notary to protest them. *Certes*, it is by no means safe to rely on the notary, for proving the presentment of a bill, unless he goes with it at the first presentation, in the middle of the day. *Parker* v. *Gordon*, *E.* 46 *Geo.* 3. 358

See BANKRUPT, No. 1.
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3 A. and B. were partners and grocers, and also partners with C. as cotton dealers, trading under the firm of A. and B.; C. not being known to be a partner. Being indebted to D. for grocery goods in the firm of A. and B. and having accepted a bill which was dishonoured, they indorsed to D. a bill belonging to the partnership in the cotton trade as a security, D. not being cognizant of the fraud: Held, that C. was liable as indorser of this bill to D. there being no fraud or collusion in him. *Swan and others* v. *Steele, clerk, and Robert Wood*, *H.* 46 *Geo.* 3. 199

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21 W. III. c. 23, of conviction of a burglar in the parish of Manchester, which consists of several townships having separate parish officers, held upon demurrer, to exempt a person from serving the office of constable for the separate township of Manchester, although the manor of Manchester at the leet for which such constable is chosen, is not co-extensive with the parish of Manchester. Held, also, that the office of constable is a parish office within the said act of parliament. *Mosely, bart.* v. *Stonehouse, H.* 46 *Geo.* 3. 181

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COPYHOLD.

1 T. T. possessed of a customary estate, parcel of the manor of S., held of the lord of the manor according to the custom of the manor, demiseable by copy of court roll, to which she was admitted on payment of a fine, saving the right of the lord, and which she surrendered to such use as should be declared by her will in writing, and of which she had granted a lease for forty-one years, upon licence, by the lord, devised the same by the description of "all that copyhold messuage at S. to Mary C. wife of C." The devise was contained in a paper of instructions written by her attorney in her presence, for the purpose of preparing a formal will, but which was not signed by her, she dying before the will could be prepared, in 1780. The paper was not proved as a will in the ecclesiastical court till 1782. Her heir was admitted to the estate as heir, in 1782, and upon his death, his son also in 1791, and they received rent upon the lease till the expiration thereof in 1800. After which, Elizabeth, not Mary Cook, the actual devisee, was admitted as devisee and brought ejectment. The lease contained a clause of re-entry for non-payment of rent, and a forfeiture was committed by the tenant, twenty years before ejectment brought. Held as follows: The freehold of this customary estate is in the lord, though it is not held *ad voluntatem domini*, and it may well pass by the description of copyhold in a will, if the intent be so, whether strictly copyhold or customary freehold. It is not within 29 Car. 2, c. 3, s. 5, nor within the 7th and 9th sections, where the words by will in writing, mean a will of lands, as in section 5 attested by three witnesses. A will directing the use of a copyhold or customary estate, is neither a declaration nor an assignment of a trust within that statute, for there is no separation of the legal and equitable estate which is essential to a trust. Such customary estate passes by the surrender and will according to the custom, and such a paper in writing proved in the ecclesiastical court, is a good will in writing under the custom, by analogy to the cases upon the statute of wills, 34 H. 8. Also, the receipt of rent for twenty years, under the lease granted by the testatrix, is no adverse possession to bar the entry of the devisee under the statute of limitations, 51 Jac. I, c. 16, and the time begins to run against her only when the lease expires, for till then, she could not bring ejectment or enter, and she was not bound to enter for the forfeiture. Neither did the descent from the heir of the testatrix to his son, during the lease, toll the entry; for the entry is not tolled where the only remedy is by entry, as in the case of a devise, nor where the estate of freehold is in the lord. Held also, notwithstanding the misnomer of Mary for Elizabeth, Elizabeth shall take under the devise, if the jury find that Elizabeth was the devisee meant by the testatrix. *Doe dem. Cook* v. *Danvers, H.* 46 *Geo. III.* 291

2 Where, in a manor, the copies of admissions, were anciently 'to hold of the lord according to the custom of husbandry of the said manor,' but other copies were to 'hold at the will of the lord,' also, and all the modern copies were so, held that this land was copyhold and not customary freehold. *Baum* v. *Rawlins, T.* 46 *Geo. III.* 405

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COSTS.

1 Where upon application to the attorney for the defendant to admit certain facts in proof, and he refused, and affi-

wards upon going to trial, it appeared that by having pleaded a tender, it became unnecessary to prove them, but the plaintiff took witnesses to the assizes for that purpose, and was allowed their expences to a large amount, in the taxed costs, notwithstanding they were not called upon the trial, the court refused to revise the taxation. *Hanborn* v. *Thomas*, *E.* 46 *Geo. III.* 361

See PRACTICE, No. 16.

2 A plaintiff having declared in trespass in a certain close for pulling up and burning 40 perches of hedge there standing and being, the defendant pleaded the general issue, and also a special plea that the hedge was erected on a common where he had right of common, and justified abating the same as a nuisance thereto; and the jury found for the defendant on the special plea, and for the plaintiff, damages 20s. on the general issue; held, that the plaintiff could not have full costs; the action being trespass, *quare clausum fregit*, in which the title to the land might have come in question, and the judge not having certified, the court could not look to the special plea, which was found for the defendant, to see that the title could not come in question. *Stead* v. *Gamble*, *H.* 46 *Geo. III.* 248

3 Two several petitions were represented against the return of a member for G. which being referred to a committee were pronounced each frivolous, held that the costs could not be taxed jointly under 28 Geo. 3, c. 52. *Strachey* and *Giles* v. *Tuxley* and *Others*, *T.* 46 *Geo. III.* 560

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1 Lease for 21 years in consideration of 5l. 8s. for a fine, and a rent of 6s. 8d. with a proviso of distress if the rent should be behind 14 days. Covenant by the lessor at the end of 18 years, or before at the request of the lessee, "to grant a new lease for the like fine, for the like term of 21 years, at the like yearly rent with all covenants, grants, and articles, as in that indenture contained." The lessor upon request tendered a lease with all covenants, except a covenant for a renewal. The lessee brought covenant for not executing a lease, and averred that the said covenants corresponded with those in various other leases, before then successively made and executed of the premises, on renewals from time to time granted. Held, that the lease tendered was sufficient; and, admitting that such an averment could properly be introduced upon the record, to explain the intent of the parties of which there was great doubt, yet it might be satisfied, although there were many instances of leases to the contrary. *Iggulden* v. *May*, *H.* 46 *Geo. III.* 269

See PRACTICE, No. 22.

2 Covenant by lessor, to give the lessee of a messuage free ingress and egress through a certain passage with a yard, with the free use of the pump in the said yard, jointly with the lessor, whilst the same should remain there, paying half the expence of keeping it in repair. Held, this is not an absolute demise of the use of the pump, but the lessor might remove it at pleasure, and an action is not maintainable, though it is alledged that the lessor moved it wilfully and without cause. *Rhodes* v. *Bulland*, *H.* 46 *Geo. III.* 173

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A. leaves a fulling mill, together with a water-course and floodgates, to a trustee for 99 years if either his daughter or wife should so long live, for their use, and in order to make provision for them, with an exception of free liberty for the lessor, his heir, &c. his servants and tenants, at all times at pleasure, to divert the water from the mill, for watering all meadows which they should think proper, and to take up and put down all proper sluices. Part of the profits of the mill consisted of water-rents, for flooding meadows, for water which was wholly diverted from the mill. Held that, by the exception, the heir of the lessor was entitled to the water-rents, the exception not being repugnant to the grant. *Lambert* v. *Bennet, M.* 46 *Geo. III.* 84

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DEVISE.

1 A testator having an estate settled on himself for life, remainder in trust, to secure 500l. a year to his wife in lieu of dower; remainder to trustees for 200 years, for the better securing of the annuity, remainder to himself in fee, gives 200l. per annum to his wife in addition to her jointure, his just debts being previously paid, and appoints three persons "as trustees of inheritance for the execution hereof;" held, *dissentiente* LAWRENCE, J. "that the trustees take an estate in fee in remainder, subject to the term of 200 years. *Trent* and *Others* v. *Hanning* and *Others, M.* 46 *Geo. III.* 69

2 A. devised a term to C. for life, and after his decease to his child or children and their executors, &c. but upon condition that in case he should die an infant unmarried and without issue, then the devise should go over to D. &c. C. survived 21, and married and died without issue; held, that the condition must be read as entire, and the devise over to D. was void. *Doe dem. Everett* v. *Cook, H.* 46 *Geo. III.* 236

3 A devise of all my estate, lands, &c. called the Coal Yard in the parish of A. held to pass the fee, otherwise the devise of the estate would be only the same as a devise of the lands, and it may be read "all my estate in lands, &c. *Roe dem. Child* v. *Wright, H.* 46 *Geo. III.* 289

4 Devise to A. for life, remainder to the lawful issue of her body in such parts, shares, and proportions, manner and form as she by will should limit and appoint; and in default thereof, to all and every the children of A. and their heirs, as tenants in common and not as joint tenants, and in default of such issue to the right heirs of the testator: Held that a child of A. took an estate in fee and not in tail. *The King* v. *the Lord and Steward of the Manor of Chertsey, Surry, E.* 46 *Geo. III.* 459

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See BANKRUPT, No. 1; and BILL *of* EXCHANGE.

EJECTMENT.

1 A. devised customary or copyhold estates to B. and his heirs in tail male, and remainder over to C. his daughter in tail. A. makes a surrender to the use of his will. B. enters and dies without admittance, and, living B., C. devises the remainder in the premises to D. her second son, in fee, subject to several charges, and afterwards dies living B. without surrendering to the use of her will, and without being admitted. There is a custom for reversioners or tenants in remainder, not in possession to be admitted upon payment of half fines, and to surrender to the use of their wills. D. the devisee of C. and her heir at law, are both admitted as tenants, and F. is in possession. Held, that at law, B. the devisee, cannot maintain ejectment, the admission of D. not being capable of being connected with the surrender of A. to the use of his will.

Semble. D. has an equitable interest and F. may be a trustee for D. and a court of equity may compel him to surrender, but D. has no legal estate, nor any remedy at law. *Doe dem. Verney* v. *Verney, M.* 46 *Geo. III.* 6

2 A. is admitted tenant of a copyhold in reversion for the life of B. after the deaths of C. and D.; before the reversion or remainder vested in possession, A. the

grantee died, and afterwards, upon the death of the first taker, and his *cestui que vie*, the administrator of A. was admitted, as administrator for the life of B. and brought ejectment: Held, that he could not recover, for copyholds are not within the statutes of special occupancy, viz. the statute 29 Car. II. c. 3, and 14 Geo. 2, c. 20, and the admission gave no title and granted no interest, but such as he claimed as administrator. *Zouch on the Demise of Thomas Forse* v. *Henry Forse*, H. 46 *Geo. III.* 191

See COPYHOLD, No. 1.

3 Where a tenant entered on meadow land at December, on pasture at March, and the houses consisting of mills, and other buildings for a manufactory, at the 1st of May, and was to pay rent at Pentecost; held that the day of entering on the manufactory, which was the principal day of entry, and not the rent day. *Doe dem. Bradford* v. *Watkins* and *Hadkinson*. 517

EMBARGO.

See INSURANCE, No. 2.

ENTRIES IN BOOKS BY PERSONS DECEASED.

See EVIDENCE, No. 6.

ERROR.

Error in parliament on judgment in B. R. Plaintiff in error dies in vacation. Plaintiff in B. R. sues out execution tested in the term preceding, held irregular because at the teste of the writ there was error pending, and execution could not be taken out in that case without leave. And where, in the next term after the defendant in B. R. died, the plaintiff moved for leave to sue out execution tested of the term preceding, it was refused, because the error must appear on the record. *Lord Kinnaird and Others* v. *Lyall*, H. 46 *Geo. III.* 280

See PRACTICE, No. 25.

See PRACTICE, No. 16.

ESTATE.

See DEVISE, No. 3.

ESTATE BY IMPLICATION.

See DEVISE, No. 1.

ESTATE CUSTOMARY.

See COPYHOLD, No. 1.

ESTATE IN FEE.

See DEVISE, No. 1.

ESTATE LEGAL.

See EJECTMENT, No. 1.

EVIDENCE.

1 A libel written in Dublin, and received in London from an unknown hand, with the Dublin post-mark, was published in Middlesex in the form of letters, which contained internal evidence of a request by the writer to the publisher, to publish them in Middlesex. Held, upon a trial at bar, upon probable evidence of the loss of the envelopes, and probable evidence of their being received by the post, that this was a publication by the writer living in Dublin, by his agent in Middlesex, and sufficient evidence of publication, both to authorize the reading of the libel and to go to the jury, upon an indictment charging the publication in Middlesex, the handwriting of the defendant to the letters being proved by persons acquainted with its character. *The King* v. *Johnson*, M. 46 *Geo. III.* 94

2 Where in a *qui tam* action for usury the principal witness, the borrower, had distributed a printed memoir containing a statement of the case which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them; held that the discovery of this circumstance after the trial was not a sufficient cause for a new trial. *Spencely* (*qui tam*) v. *De Willott*, E. 46 *Geo. III.* 321

3 Where an attorney in a cause had been served with a notice to produce an agreement entered into by his client, held that he was bound to give evidence of the conteres of such notice; for the privilege as to evidence is confined to the oral or written communications of the client himself, and does not extend to all papers and communications which the attorney receives in the course of the cause.—*Spencely* (*qui tam*) v. *Schullenburgh*, E. 46 *Geo. III.* 325

4 By order of two justices, not appealed from, J. S. and Betty his wife were removed to M. N. as their last place of settlement, and, afterwards, the said Betty as the wife of J. S. was removed

from the parish of W. to the said parish of M. N., without appeal. Betty went and served in the parish of B. and resided forty days there, for under a hiring of a year and returned to M. N. and there became chargeable. J. S. was at the quarter sessions, convicted of vagrancy, for deserting his said wife; but upon appeal against an order of justices removing the said Betty from M. N. to the parish of B. the appellants produced evidence to shew the marriage a nullity, which was not denied; held, that, after the orders unappealed from, and the conviction, the respondents were estopped from producing such evidence.

Order of removal "upon complaint that the paupers lately came and intruded into the said parish of K, endeavouring there to settle as inhabitants thereof, contrary to law, not having anyway acquired or obtained a legal settlement therein, and are likely to become chargeable thereto, and we do upon due examination, adjudge the said complaint and premises to be true, and we do further, upon the examination of the said Betty the wife of J. S. upon her oath, adjudge that they were last legally settled at, &c." held to contain a sufficient averment of their being then actually intruding, and of their then present settlement, and also to be upon sufficient examination, although only upon that of the wife; for a wife may know her husband's last place of settlement of her own knowledge. *The King* v. *the Inhabitants of Binegar*, E. 46 *Geo. III.* 353

5 Where the indorser of a bill of exchange, upon being called upon for payment by a subsequent indorsee, on failure of the drawee, said that he had no notice, but it was a just debt, and he would payit; and offered a bill on London at two months; held that this promise was a sufficient admission of the due presentment and a waiver of the want of notice, and not a conditional promise, upon which it was necessary to declare specially. *Lamdie* v. *Robertson*, H. 46 *Geo. III.* 225

6 Tenant for life with leasing power, reserving the ancient rent, receives a letter from his steward with an account of the rents, which he indorses thus; "From H. account of my estate at C." and preserves amongst his muniments, and also makes entries of the receipt of rent from the same estate in his books, a subsequent tenant for life grants a lease under a power, the remainder-man brings ejectment against the lessee; held that the letter to, and account of receipts by the first tenant for life, found amongst his muniments being an authentic recognition of the amount of the rent in his time, is good evidence of the ancient rent as against the tenant under the leasing power, because that tenant for life had perfect knowledge of the fact, and had an interest to state it favourably for the tenant, by keeping down the ancient rent to enhance the fines or renewal under his own power, and it could not be used for him. *Roe dem. Brune* v. *Rawlins*, H. 46 *Geo. III.* 254

7 One claimed the first grass or *prima tonsura* by copy of court-roll under a grant of *tres acras prati*; but another had the aftergrass, and lopped the trees and cleansed the ditches, and repaired the fences, and exercised all other acts of ownership. And upon *trespass quare clausum fregit*, and an issue whether it was the plaintiff's close, soil, and freehold, or copyhold of a certain manor, held that the plaintiff as owner of the after grass, and pasture, might establish his claim to the freehold by evidence of acts of ownership, notwithstanding the grant of *tres acras prati* by copy. For there may be a freehold right in the one thing (the soil) and a copyhold in the other (*prima tonsura*). And *pratum* may mean only the first grass therein, if warranted by the possession, which guides the construction of old grants.—And *prima tonsura* is not conclusive but merely *prima facie* evidence of the freehold, but the word close must mean, in pleading, the freehold. And this was so held; though he who has *prima tonsura* paid all the taxes, for that was merely by his negligence. *Stammers* v. *Dixon*, H. 46 *Geo. III.* 261

8 The sessions must find as a fact whether a parish can or cannot have the benefit of the 43 Eliz. *The King* v. *Watson*, H. 46 *Geo. III.* 283

9 In the case of an injury done to church lands, by a rivulet being penned back upon them by a headstock, the proof of the existence of the headstock for about 20 years, though it would be evidence of a grant in other cases, is not sufficient to warrant the continuance of it. For the grant of the prior incumbent will not bind the successor. But it may be used as evidence to shew an ancient grant, yet even that cannot be

if the commencement of the first erection be shewn, for that rebuts the presumption of antiquity. *Wall* v. *Nixon*, *H.* 46 *Geo. III.* 316

See SETTLEMENT, 2.

9 On cross examination to try the credit of a witness held, that only general questions can be put, or such as relate to the issue in question, and he must not be examined as to particular and distinct facts collateral to the issue, in order, if he mis-state them, to contradict him by another witness. *Spencely* (*qui tam*) v. *De Willot*, *H.* 46 *Geo. III.* 289

2 On a *quantum meruit* for work and labour, the defendant may give evidence that the work was not done well; and need not be put to his cross action.

Aliter where the demand is upon an agreement for a stipulated sum, and the plaintiff has no notice of the defence; because he may be taken by surprise: which cannot happen upon a *quantum meruit*. *Baston* v. *Butter*, *T.* 46 *G.* 3. 486

See ASSUMPSIT, 2.

EXCEPTION.

See DEMISE, 1.
See COVENANT, 1.

EXECUTION.

See PRACTICE, 17.
See BANKRUPT, 1.

EXECUTION, LEAVE TO TAKE OUT.

See ERROR, 1.

EXECUTOR.

See PLEADING, 3.

EXTORTION.

See PLEADING, 7.

FEE OR FOR LIFE.

See DEVISE, 3.

FEME COVERT.

See PRACTICE, 24.

FINE.

See PRACTICE, 10.

FISHERY.

See NUISANCE, 1.

FORFEITURE.

See COPYHOLD, 1.

FRAUD AND COLLUSION.

See BILL *of* EXCHANGE, 3.

FRAUDS, STATUTE OF.

See AGREEMENT, 1.

FRAUDULENT DEVISE.

See PLEADING, 8.

GRANT.

1 *See* EVIDENCE, 9.

2 Grant to one his heirs and assigns, in consideration of a sum of money, of a liberty for him his heirs and assigns, to carry up a sough (or a drain for a colliery) from the bottom of a piece of land of the grantor to an adjoining piece of land of the grantee, and also liberty for him his heirs and assigns to make two little sough pits in the said land of the grantor, in a certain place there, for the more easy and safe carrying up the tail of the sough, one of them to be covered from the top of the intended sough to the surface of the ground, as soon as conveniently may be done, after the making thereof, and the other to be kept open for examining the sough as long as is necessary for that purpose and no longer; held, that the grant of the sough is a continuing grant, and the right of opening the sough pit occasionally, for the necessary repair of the sough, is incident thereto by virtue of the grant. *Hodgson* v. *Field*, *T.* 46 *Geo.* 3. 538

HABEAS CORPUS.

See PRACTICE, 11.

A woman having the possession of a child for some time, claiming it as her own, was dispossessed of it by artifice; the court granted a habeas corpus for the child, against the person who had so obtained possession of it. *Rex* v. *Hopkins*, *T.* 46 *Geo.* 3. 577

HIGHWAY.

See INDICTMENT, 1.

INDENTURE.

See SETTLEMENT, 2.

INDICTMENT.

1 In order to be discharged from an indictment for not repairing a highway, the parties must produce an affidavit that the road is now actually repaired since

the conviction, and is likely to continue so. *The King* v. *the Inhabitants of Loughton.T* 46 *Geo.* 3. 575

INFANT.

See HABEAS CORPUS, No. 1.

INFERIOR COURTS.

See LORD'S ACT, No. 1.

INFORMATION CRIMINAL.

See PRACTICE, No. 12.

INHERITANCE TRUSTEE OF.

See DEVISE, No. 1.

INSOLVENT ACT.

See BANKRUPT, No. 1.

INSOLVENT DEBTOR.

See BANKRUPT, No. 3.

INSURANCE.

1 Corn was insured free from average, unless general from Waterford to Liverpool. The vessel was run on shore at Waterford on the 28th of January, and was wholly under water at high water. Part of the corn was taken out by the insurers and kiln dried, and the assured received the net produce. On the 18th of February, 21 days after the loss, the assured gave notice of abandonment which the insurers refused to accept, Held, that the notice of abandonment was too late to entitle the assured to recover as for a total loss. *Anderson* v. *the Royal Exchange Assurance Company, M.* 46 *Geo. III.* 48

2 Upon an embargo or detention where there is an abandonment of both ship and freight to the respective insurers and the owner is paid as for a total loss and notwithstanding the ship is released and earns freight, the wages of the crew, the port, and other charges are *quasi*, a general average or salvage on the ship and freight, according to the particular nature of such charges and the persons to whom they belong, and in an action for money had and received by the underwriters on the freight against the assured who has received it, he may deduct the same out of the sum to be recovered. *Sharp* v. *Gleadstone, M.* 46 *Geo. III.* 39

3 Where upon the trial of one of several causes which were consolidated, there was a rule nisi obtained for a new trial, on a point of law reserved, and the defendant agreed to abandon it, the defendants in other causes were permitted upon motion to have the name of another defendant inserted in his place in order where the benefit of the rule to shew cause. *Lubbock* v. *Claggett, E.* 46 *Geo. III.* 397

4 Where, upon the trial of one of several causes which were consolidated there was a rule nisi obtained for a new trial, on a point of law reserved, and the defendant agreed to abandon it, the defendants in other causes were permitted upon motion to have the name of another defendant inserted in his place in order where the benefit of the rule to shew cause. *Lubbock* v. *Potts, E.* 46 *Geo. III.* 397

5 An insurance of British property, from all risks whatever, British capture, seizure and detention included, is legal, for it may be intended to guard the assured against unlawful or occasional seizure and detention, *aliter* if enemy's property.

Colonial produce of the plantations cannot be transported from thence direct to Gibraltar or any place in Europe, under the statute 12 Car. II. c. 4, s. 8, &c. called the navigation acts, and an insurance upon a ship on such voyage, with colonial produce, is illegal, and there can be no return of premium. *Lubbock* v. *Potts, T.* 46 *Geo. III.* 401

6 It is sufficient if the assured in making the insurances communicate fairly the present state of the ship, and lay open such circumstances *pro et contra*, as may lead the insurer to make further enquiries concerning the prior state of the ship, so, where on a policy from twenty-four hours after the arrival of an African trader at her first place of trade on the coast of Africa, &c. a letter was communicated stating the arrival in March at Gabon river, that they had got part of their red wood and expected to get all in the next month and would sail in May, that they had now got nine men, but provisions were low, that they were so weakly handed that the natives did as they pleased, and referred to a prior letter which was not communicated, but in which had been previously stated the loss of several men, by an insurrection of the natives and by disease, reducing the crew to five, and the loss of running rigging, and other necessaries; held, that this last

letter was a sufficient communication, it being a true account at the time, and referring to past transactions, and to a prior letter, concerningwhich the underwriter might have enquired. The premium was very high. *Freeland and Another Assignees of Tipping* v. *Glover* T. 46 *Geo. III.* 424

See BANKRUPT, 7.

ISSUE ON SEVERAL FACTS.

See BANKRUPT, 3.

JUDGE'S ORDER.

See BANKRUPT, 1.

JUDGMENT CRIMINAL.

See PRACTICE, 10.

JURY.

See SEWERS, 1.
See EVIDENCE, 2.

JURISDICTION.

See SEWERS; 1.

JUSTICES.

1 Where a seafaring man is arrested for a debt of less than 20l. and has given bail, and is afterwards impressed into his majesty's service, the bail by tho equity of the statute 23 Geo. 3, c. 33, s. 22, are entitled to have an exoneretur entered, if they be not indemnified, and the impress is without collusion. *Robertson* v. *Patterson*, T. 46 *Geo. III.* 556

LIBEL.

Semble. Although the truth of a publication is no justification, yet, if the court see that it is true, or probably may be true, it may be good cause why the court should not interfere by granting a criminal information.

Where the party applied for time to send to Trinidad, for an affidavit of the truth of certain matters in a libel, in order to shew cause, against such a rule the court would not grant further time. affidavits taken abroad before judges there, and verified, although receivable as affidavits of debts, are not to be received, on rules to shew cause, in opposition to affidavits made in this court. *The King* v. *Draper*, E. 46 *Geo. III.* 390

See EVIDENCE, 1.
See PLEADING, 9.
See PRACTICE, 12.
See PLEADING, 12.

LIBERTY OF THE PRESS.

See PLEADING, 12.

LIENS.

See TROVER, 2.

LORD'S ACT.

1 The lord's act to reply in inferior courts, but debtors in execution on processes issuing therefrom, must apply to be discharged, within the next term after being charged in execution, calculated by the terms in the superior courts as known in the calendar. *The King* v. *the Bailiffs of Ipswich*, M. 46 *Geo.* 3. 193

See PRACTICE, 5.

MANDAMUS.

1 Where a company was incorporated solely for adventure and profit by their mutual labour, and to receive a daily pay for such work as each member should perform for the corporation, and a bye-law was depriving one of his profit in certain cases until a fine be paid, as if he ceased to be a freeman, and where one was so deprived of profit, held that it was not an amotion from the corporation, and he was not entitled to a writ of mandamus to restore him. *The King* v. *the Free-fishers and Dredgers of Whitstable*, E. 46 *Geo. III.* 319

2 A mandamus to a bishop to grant a license to a curate, upon the nomination of the inhabitants of a parish, must state that there is an immemorial usage for the inhabitants to elect, or an immemorial endowment; for a nomination by the inhabitants merely, is not sufficient title to call upon the bishop to licence. *The King* v. *the Bishop of Oxford*, E. 46 *Geo. III.* 341

See SIMONY, No. 1.

3 Where the road at the end of a public bridge for 300 yards lay in several parts of a parish called Mears, and was out of repair, and the county was indicted for not repairing, and pleaded not guilty; held, upon special verdict that upon such a plea evidence of ancient usage for the mears to repair, and not the county was inadmissable, and

there must in such a case be a verdict for the crown upon the plea of not guilty, if the bridge be a public bridge, and the road out of repair. *The King* v. *the West Riding of the county of York, E.* 46 *Geo.* 3. 467

MARINER.

See SETTLEMENT *by* APPRENTICESHIP, 1.

MASTER OF A WORKHOUSE.

See POOR, 2.

MONEY HAD AND RECEIVED.

See BANKRUPT, No. 7.

MORTGAGE.

See PRACTICE, 22.

NAVIGATION LAWS.

See INSURANCE, 1.

NON PROS.

See PRACTICE, 16.

NOTES, SEPARATE COUNTS ON SEPARATE.

See PRACTICE, No. 4.

NOTICE.

See ASSUMPSIT, No. 2.
See EJECTMENT, No. 3.

NOTICE OF NONPAYMENT, PROOFS OF.

See EVIDENCE, No. 5.

NUISANCE.

Semble. A prescription or grant of a fishery cannot authorise the erecting of a weir entirely across a public river, whereby the passage of all fish shall be prevented; for that is *prima facie* a public nuisance. *Weld* v. *Hornby*, *H.* 46 *Geo.* 3. 244

OCCUPANCY.

See EJECTMENT, No. 2.

ORDER OF JUSTICES.

See EVIDENCE, No. 4.

OUTLAWRY.

See PRACTICE, No. 13.
See PLEADING, No. 1.

PARISH OFFICE.

See CONSTABLE, No. 1.

PARTICULARS OF SALE.

See AUCTION, No. 1.

2 Sugars were sold by auction, by a broker according to a certain catalogue, which did not contain the entire particulars or conditions of sale; the conditions or very material parts of them, were written on a separate paper and read by the broker at the sale, and laid by him on the desk with the catalogue; the catalogue was entitled only "a catalogue of sugars, to be sold 20th September, for particulars apply, &c.;" the conditions were entitled conditions of sugar sale, 20th September, but there were no direct words of reference to either in the one or the other, and they were not pinned together; at the time of the sale the broker's clerk wrote a memorandum of the name of the purchaser, (the defendant) against the article sold with the price; and samples of about half a pound each, were delivered, which were calculated on the weight of the commodity: held that, although the broker must be considered as the agent of both parties, yet as the catalogue did not contain all the conditions of sale, and the conditions were chiefly on a separate paper, the memorandum was not a memorandum in writing, within the statute of frauds; but, by the delivery of the sample, the case was taken out of the statute, for, although a sample is a thing delivered *alio intuitu*, and not principally as a part performance of the contract, yet, where it is a part of the commodity and taken in the weight or measure, it may also operate to comply with the terms of the exception in the statute. Sales by auction of goods are not to be considered as excepted, by the equity of the statute of frauds. *Hinde* v. *Whitehouse*, *T.* 46 *Geo.* 3. 528

PARTNERS.

See BILL *of* EXCHANGE, No. 3.

PAUPER.

See SETTLEMENT, No. 3.
See SETTLEMENT, No. 4.
See SETTLEMENT, No. 5.
See SETTLEMENT *by* SERVICE, 1.
See SETTLEMENT *by* APPRENTICESHIP, 1.

PAYMENT IN COURSE OF TRADE.

See BANKRUPT, No. 6.

PENALTY.

See PRACTICE, No. 10.

PERSONAL PROPERTY.

See BANKRUPT, No. 2.

PETITION IN PARLIAMENT.

See COSTS, No. 3.

PLAINTIFF'S COSTS.

See PRACTICE, No. 2.

PLANTATIONS.

See INSURANCE, No. 1.

PLEA.

See PRACTICE, No. 7.
See PRACTICE, No. 23.

PLEA TITLE OF.

See PRACTICE, No. 15.

PLEADING.

1 In declaring against one defendant, upon a contract jointly with another defendant who is outlawed, it is not necessary to aver the outlawry with a *prout patet per recordum*, if it appear to be in the same suit.

Q. Whether it is necessary if the outlawry be by another and extrinsic record. *M'Michael* v. *Johnson*, *M.* 46 *Geo. III.* 56

2 A declaration in debt on a *quantum meruit*, stating that the defendant agreed to pay so much, &c. is good, being similar to a *concessit solvere*; *Aliter*, if undertook and faithfully promised, which sounds in assumpsit. *Ninan* v. *Bland*, *M.* 46 *Geo. III.* 114

3 A. and B. were executors of C., of whom B. was a simple contract creditor; A. having received 400l. of the assets of C. remitted them to B. to pay a bond debt due to D. and at the same gave notice thereof to D. B was then in good credit, but failed and became bankrupt twelve months afterwards, and had then no assets of C. D. proved under B.'s commission and received a dividend. Held, that A. having received assets was answerable at law for the misappropriation by B. Semble, that in all the cases at law and in equity, the receipt of the money is sufficient to charge the executor, *Cross and Others* v. *Smith and Another*, *H.* 46 *Geo.* 3. 203

4 Declaration for words not actionable of themselves, laying as special damage that certain persons, by name, who used to invite the plaintiff to their house, and give her meat and drink, gratuitously, whereby she saved a large sum, to wit, 100l. per annum in her necessary expences, afterwards refused to do so. Semble, this is upon the face of the record, special damage sufficient to maintain the action, though if it appear to be of a trifling nature, the jury must find a verdict for the defendant. *Meagher* v. *Moore*, *H.* 46 *Geo.* 3. 135

5 A horse being sold with a warranty, the purchaser went to return it for unsoundness, when the seller acknowledged that he had warranted the horse sound, and would return the money if it were not so. Held, that this is proof of a warranty upon the original sale, but yet is merely a proposal towards an agreement to return the money, and is not evidence to enable the purchaser to recover upon a count for money had and received. He must proceed upon the warranty as before, for the unsoundness is still in dispute. *Payne* v. *Whale*, *H.* 46 *Geo.* 3. 139

6 To debt on a bail-bond, at the suit of the sheriff, the defendant pleaded that the action was brought for the benefit of one S. a bailiff to the plaintiff, and that on the arrest, he paid 22l. on account of debt and costs to S. for the plaintiff in the suit, and also 5l. further, in satisfaction, before the rule on the sheriff expired, and which would have satisfied the debt and costs, and was by S. accepted in satisfaction; held bad, on demurrer, for S. had no legal interest in the bond, and no power even to release by deed, and satisfaction without deed is no plea, and it ought to have been the ground of an application to the equitable jurisdiction of the court, if available at all, *Scholey and Another* v. *Page*, *H.* 46 *Geo.* 3. 145

See PRACTICE, No. 4.
See BANKRUPT, No. 3.

7 A person acting as collector of the income tax under the statute 43 Geo. III. c. 69, and by the acknowledged appointment of the commissioners, although his assessment is not duly assigned under 43 Geo. III. c. 99, s. 22, is nevertheless to be considered, with respect to all penalties for misconduct, as a collector under that statute, and liable to no other penalty or punishment, except such as is thereby imposed; by reason of s. 51. which exempts collectors from all penalties, other than by that act, or by the acts therein recited

imposed. And, therefore, where such collector committed an offence within the act, which would have been extortion at common law; Semble, that he could only be prosecuted for the pecuniary penalty under that act. *The King* v. *Dobson and Another*, H. 46 *Geo.* 3. 213

8 The statute 3 W. and M. c. 14, s. 2, 3. against fraudulent devises, does not extend to make the devisee of lands liable in an action of covenant, but only to actions of debt. *Wilson* v. *Knubly*, H. 46 *Geo.* 3. 123

9 Where the plaintiff declared against the defendant for publishing a libel in an account of a trial imputing to him the crime of perjury, and judicial delinquency in his character of clerk of the court of requests at Liverpool, and the defendant endeavoured to justify 'as to such parts of the supposed libel as purport to contain an account of the trial of the plaintiff, for an assault, &c. and of the facts, circumstances, and statements, which occurred;' held upon special demurrer, that a justification in such general and indefinite terms was bad, for although to avoid prolixity of pleading, parts of the libel might be separated and justified by distinct reference, yet this general separation of facts from observations left the matter justified wholly uncertain.

Qu. What statement of legal proceedings may be justified? *Carr* v. *Jones*, T. 46 *Geo.* 3. 491

10 Declaration in debt that the defendant kept a snare for killing hares, *contra formam statuti*, whereby and by force of the statute, an action hath accrued to demand 5*l.* held good, in arrest of judgment; the offence being created by one statute, and the action for the whole penalty to the informer being given by several subsequent statutes incorporated in the statute 2 Geo. III c. 19. The first clause refers to the first statute, the second to the last.

Qu. Whether *vigore statuti* may be omitted in such a declaration. *Lord Clanricard* v. *Stokes*, T. 46 *Geo. III.* 506

11 In an action upon an annuity bond where the defendant pleads the statute, if it appear by the pleadings that the consideration is for relinquishing of business, and not as money consideration, and therefore, excepted by the statute, the plaintiff may demur, and need not be put to reply that the bond is not within the statute. *Doe dem. Worke* v. *Jackson*, T. 46 *Geo. III.* 522

12 Where the plaintiff declared against the defendant for publishing a libel in an account of a trial imputing to him the crime of perjury and judicial delinquency, in his character of clerk of the court of requests at Liverpool, and the defendant endeavoured to justify 'as to such parts of the supposed libel as purport to contain an account or statement of the trial of the plaintiff for an assault, &c. and of the facts, circumstances and statements, which occurred;' held, upon special demurrer, that a justification in such general and indefinite terms was bad; for although to avoid prolixity of pleading, parts of the libel might be separated and justified by distinct reference, yet this general separation of facts from observations left the matter justified wholly uncertain.

Qu. What statement of legal proceedings may be justified. *Carr* v. *Jones*. T. 46 *Geo.* 3. 491

POOR.

1 Where several districts of a parish lying in several counties, by agreement, unite in appointing overseers for upwards of 30 years, a rate made for the whole parish will be valid, they having substantially the benefit of the 43 Eliz. c. 2. *Lane* v. *Cobham and another*, M. 46 *Geo.* 3. 1

2 A master of a workhouse appointed in vestry, has not a public office or charge under 3 and 4 W. III. c. 11, s. 6. to gain a settlement. A public office and charge are the same thing. Such charge or office must be such as must necessarily be filled in succession, not a mere duty, upon a contract, which may be suspended or continued at pleasure.—Semble, the test of an office or charge, is that it imposes a duty for the neglect or breach whereof the party may be indicted. *The King* v. *the Inhabitants of Mersham* H. 46 *Geo.* 3. 151

3 On a conviction before a justice of the peace, it must appear expressly upon the statement of the evidence, that the offence was committed within the time limited for the conviction; and it cannot be supplied by intendment or by information. Therefore, where a conviction stated an information for an offence committed within three months last past, to wit, on the 22d of May last past, and the evidence was stated of a fact committed on the 22d day of May, without stating in what year, and without reference to the said 22d day of May, to ascertain the year, it was quashed. *The King* v. *Woodcock*, H. 46 *Geo.* 3. 286

PRACTICE.

1 A rule *nisi* for an attachment cannot be obtained on the last day of term. *Anonymous, M.* 46 *Geo.* 3. 118

2 An attorney, plaintiff, suing for his costs, held, not within the jurisdiction of the London court of requests, 39 and 40 Geo. III. c. 104. He therefore may sue in B. R for a sum less than 5l. for costs. *Broad* v. *Parker, M.* 46 *Geo.* 3. 52

3 "Justly indebted to the plaintiff in 200l. upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficiently certain to hold to bail, and it is not necessary to state whether the plaintiff is payee or indorsee. *Bradshaw* v. *Saddington, M.* 46 *Geo.* 3. 117

4 Where there is a count on each of several notes of a banker, payable to bearer, the court will not strike them out as superfluous, and put the plaintiff to the inconvenience of proving the consideration on account for money had and received. *Lane* v. *Smith, M.* 46 *Geo.* 3. 113

5 An agreement by a debtor with his creditor not to be entitled to take the benefit of the Lord's act, will not be supported by a court of law. *Parish* v. *Wolstonecraft, M.* 46 *Geo.* 3. 51

6 After proceedings being delayed a year, a term's notice of executing a writ of inquiry is sufficient; without giving a term's notice, of intending to proceed, and then a notice of executing the writ. It is therefore not necessary to give a term's notice of intending to proceed, but a term's notice of the next proceeding. *Smith* v. *Paull, M.* 46 *Geo.* 3. 101

7 Where the defendant, being sued by original, had pleaded the statute of additions in abatement of the original writ, and had given a rule to reply without oyer of the original writ, the court upon motion, discharged the rule to reply, in order to let in the plaintiff to sign judgment, as for want of a plea; notwithstanding the rule that oyer cannot now be prayed of an original writ.

Semble, No advantage can now be taken of a variance between the writ and the declaration. *Desbons* v. *Head, E.* 46 *Geo.* 3. 363

8 "Justly indebted for goods sold and delivered," not stating by whom, to whom, or for whose use, is insufficient for an affidavit to hold to bail. *Perks v. Severn, E.* 46 *Geo.* 3. 339

9 Bail to the sheriff may set aside an attachment upon payment of costs, and putting in bail without swearing to merits, or that there is no collusion, if it be sworn that it is made on the part of the bail to the sheriff. *The King* v. *the Sheriff of Middlesex in Re Flack* v. *Beecroft, E.* 46 *Geo.* 3. 340

10 Where a fixed fine, by statute, for a misdemeanor, is miscalculated in the verdict and the judgment, the court upon a rule served on all parties interested, will alter the rule for the judgment against the prisoner, and the entry roll, as to so much of the punishment, but they will not alter the judgment and verdict. *The King* v. *Stevens, and Another E.* 46 *Geo.* 3. 366

11 Upon a *habeas corpus* on which the gaoler returns a commitment, the court will only try the validity of the commitment upon the face of it. And where a return was that an apprentice was committed for absenting himself from his master's service, under stat. 20 Geo. II. c. 19. s. 4, which appeared good, the court remanded the apprentice, although it was sworn that he was bound when a minor, and that when of full age he avoided his indentures.

A *habeas corpus* cannot be to discharge an apprentice when of age from indentures; *exparte* M Davis, 5 Term Rep. 715. *contra. Semble*, it should be to bring up the apprentice from some custody or improper controul over his person; as, perhaps, that of the master, if he detain him by force in his service. *The King* v. *Fenwick Exparte Gill, E.* 46 *Geo* 3. 369

12 Semble. Although the truth of a publication is no justification, yet, if the court see, that it is true, or probably may be true, it may be good cause why the court should not interfere by granting a criminal information.

Where the party applied for time to send to Trinidad, for an affidavit of the truth of certain matters in a libel, in order to shew cause, against such a rule the court would not grant further time. Affidavits taken abroad before judges there, and verified, although receivable as affidavits of debts, are not to be received, on rules to shew cause, in opposition to affidavits made in this court. *The King* v. *Draper, E.* 46 *Geo.* 3. 390

13 Where one is arrested on a joint contract for a small debt, and the other debtor is not arrested but is abroad: and the proceedings to outlawry against him would exhaust the debt, the court will

not compel the defendant who is arrested to relinquish his right to plead in abatement. *Anonymous*, H. 46 *Geo. III.* 318

14 After a rule to abide by a plea, the defendant cannot withdraw a demurrer and plead *non est factum*, and also two special pleas to several breaches in covenant, although the latter pleas only tend to put the facts in issue.

Semble. He may plead the two special pleas without the *non est factum*. *Clewley and Another* v. *Ramsbottom*, H 46 *Geo.* 3. 179

15 A plea is an action of qui tam, not entitled qui tam, nor describing the plaintiff as suing qui tam, is not such a nullity as that the plaintiff can sign judgment as for want of a plea, if there be not some other cause for misleading the plaintiff as to the real action in which the plea is pleaded. *Dale* (qui tam) v. *H Beer*, 46 *Geo* 3. 243

16 The motion to refer it to the master to compute principal and interest, &c. is not to be made till the day after interlocutory judgment is signed. *Gordon and Another* v. *Corbett*, H. 46 *Geo.* 3. 179

17 If a defendant is superseded for want of being charged in execution, he cannot be taken in execution again upon that judgment. *Line* v. *Lowe*, H. 46 *Geo.* 3. 267

18 When a writ of error in the exchequer chamber is non prossed for want of a transcript, the defendant in error is not entitled to costs under the statute 3 Hen. VII. c. 10. *Salt* v. *Richards and Others*, H. 46 *Geo.* 3. 121

19 Although common process may be served on the last day of the return, and although the declaration may be filed *de bene esse* on the same day, and notice served, yet if the process be served at the same moment of time it is bad, for it excludes the possibility of the declaration being well filed at the time of the service of notice since the declaration cannot be filed in point of law till after. *Brook* v. *Bennett*, T. 46 *Geo.* 3. 432

20 Venue not allowed to be changed from Lancaster to London, on account of a great number of witnesses residing there, who were to prove the commodity sold to have been bad, in an action by the vendee against the vendor. *Anonymous*, E. 46 *Geo.* 3. 434

21 Where, by mistake notice of bail was given as put in at the chambers of one judge, where it was put in before another judge, and the plaintiff not finding the entry of the bail, proceeded upon the bail bond, and upon serving process the principal rendered, and the bail offered to pay costs, the proceedings were afterwards set aside, upon payment of costs up to the first offer to pay costs. *Crawford* v. *Oxley*, T. 46 *Geo.* 3. 515

23 A mortgagee having filed a bill of foreclosure and having proceeded to execution in ejectment and being in possession of the rents and profits of 200l. a year under an ejectment, and having brought covenant for the mortgage money and obtained execution, the court refused to discharge the defendant out of execution; for the plaintiff has a right to his remedy on all his securities. *Colby* v. *Gibson*, T. 46 *Geo.* 3. 516

23 Where plaintiff issued a latitat which was not returned, then *alias* and *pluries* and before service, but after the issuing of the last writ, the defendant paid the debt but not the costs, held that the plaintiff might proceed to recover costs, the action being commenced either by the latitat or the pluries, &c. before payment. *Toms* v. *Powell*. T. 46 *Geo.* 3. 554

24 Where a summons is obtained for time to plead and indorsed, the defendant must draw up and serve the order, or it will be null, and the plaintiff may sign judgment. *Sedgwick* v. *Allerton*, T. 46 *Geo.* 3. 559

25 Where a married woman has a settlement by deed of separation, and she is trusted by a creditor, knowing her to be married and living separate from her husband, she may nevertheless be discharged upon filing common bail. *Wardell* v. *Gooch*. T. 46 *Geo*, 3. 576

2 Bail in error are as no bail if there be an exception against them, and the defendant in error non prosses the writ of error for want of justification. He therefore cannot proceed against them. *Gould* v. *Holmstrom*, T. 46 *Geo.* 3. 578

PRIMA TONSURA.

See EVIDENCE, No. 7.

PRISONERS.

See LORD'S ACT, No. 1.

PROTEST.

See BILL OF EXCHANGE, No. 2.

PUBLIC OFFICE A CHARGE.

See POOR, No. 2.

QUANTUM MERUIT.

See ASSUMPSIT, No. 2.
See EVIDENCE, No. 22.

RENEWAL.

1 Several customs pleaded for all tenants of a manor, their farmers and occupiers of tenements of the manor, having gardens to take soil covered with grass on a common, for making and repairing grass plots in gardens for the improvement thereof, and for the improvement of the gardens, and further for the making and repairing of banks and mounds for the hedges and fences of tenements belonging to the manor; and, further for the improvement of such tenements, not saying agricultural improvement; held, each to be too large and uncertain, and to be destructive of the right of common, and therefore bad. *Wilson* v. *Willes*, *H.* 46 *Geo.* 3. 167

REQUESTS, LONDON COURT OF.

See PRACTICE, No. 9.

RIVER.

See NUISANCE, No. 3.

SALE OF GOODS.

See AGREEMENT, No. 2.

SALVAGE.

See INSURANCE, No. 2.

SATISFACTION.

See PLEADING, No. 6.

SEAMAN.

See JUSTICE, No. 1.

SEPARATE PARISHES.

See POOR, No. 3.

SETTLEMENT.

1 Where a part of a farm lay in the township of W. and part in the parish of B. a poor-rate for the parish of B. for the part in B. was held good, though previously the tenant had paid only poor-rate to A. but he had paid tithes and church-rate to B. *The King* v. *the Inhabitants of Etwall*, *M.* 46 *Geo* 3. 15

2 The production of an indenture of apprenticeship is sufficient evidence of apprenticeship duly effected by indenture, without shewing the payment of the duty upon the apprentice fee, after 20 years, for that may be presumed; neither is it rebutted by shewing that there is no entry of payment of such duty in the book of the receiver of the duty for *non liquet*, but he might have neglected to enter it. *The King* v. *the Inhabitants of Long Buckley*, *M.* 46 *Geo.* 3. 96

3 By order of two justices, not appealed from, J. S. and Betty his wife were removed to M. N. as their last place of settlement, and afterwards the said Betty as the wife of J. S. was removed from the parish of W. to the said parish of M. N. without appeal. Betty went and served in the parish of B. and resided forty days there, under a hiring for a year, and returned to M. N. and there became chargeable. J. S. was at the quarter sessions, convicted of vagrancy, for deserting his said wife, but, upon an appeal against an order of justices removing the said Betty from M. N. to the parish of B., the appellants produced evidence to shew the marriage a nullity, which was not denied; held, that, after the orders unappealed from, and the conviction, the respondents were estopped from producing such evidence.

Order of removal, "upon complaint that the paupers lately came and intruded into the said parish of K. endeavouring there to settle as inhabitants thereof, contrary to law, not having any way acquired or obtained a legal settlement therein, and are likely to become chargeable thereto, and we do upon due examination adjudge the said complaint and premises to be true, and we do further upon the examination of the said Betty the wife of J. S. upon her oath, adjudge that they were last legally settled at &c." held to contain a sufficient averment, of their being then actually intruding, and of their then present settlement, and also to be upon sufficient examination, although only upon that of the wife: for a wife may know her husband's last place of settlement of her own knowledge. *The King* v. *the Inhabitants of Binegar*, *E.* 46 *Geo. III.* 353

4 A Greenwich pensioner placed out to board by his parish at 2s. 6d. a week paid by them to an inhabitant of another parish for his board, &c. he working as a servant for him, does not acquire a settlement by such residence and ser-

vice. *The King* v. *the Inhabitants of Rickinghall, E.* 46 *Geo.* 3. 373

5 Where a pauper, apprenticed to the master of a small trading vessel had slept more than forty nights at S. but slept the last night of his service at B. and had slept there previously, more than forty-nights at his grandmother's, in consequence of being ill of a fever, and was received back by his master; held, that he was not settled in B. the residence, except for the last night, being only in consequence of sickness. *The King* v. *the Inhabitants of Barmby, E.* 46 *Geo.* 3. 375

6 A pauper hired for a year ending 31st of March, goes on the 25th of March with leave of his master to a mop or statute for hiring of servants, in order to get a place at the end of his service, and returning early in the morning of the 26th, the master turns him away offering him less than his wages, the pauper on the next day summons the master before a magistrate, who orders the master verbally to deduct 2s. 6d. from his whole wages, the pauper goes into another service, and is shortly after paid his whole year's wages. Held that the pauper gains no settlement during his service with the first master. *The King* v. *the Inhabitants of Leigh, T.* 46 *Geo.* 3. 567

SETTLEMENT BY APPRENTICESHIP.

1 A pauper apprenticed to a mariner of Topsham, to serve on board a ship trading from Poole to Shields, is at Poole with the vessel in the course of his service where his master becomes a bankrupt and the service is terminated, and there resides more than forty days sleeping on board the vessel; held, that he gains a settlement at Poole. *The King* v. *the Inhabitants of Topsham, Devonshire, T.* 46 *Geo. III.* 457

SETTLEMENT BY SERVICE.

1 Where a servant who was hired for a year on the 18th of October, with liberty to quit on a month's notice or a month's warning, gave notice to quit at old Michaelmas, and upon applying to her mistress for wages, she told her that she had a week to serve, the servant offered to serve the week but the mistress said it was no matter, she had got another servant in the house, held that there was a dissolution of the contract, and not a dispensation of the service. *The King* v. *the Inhabitants of the Parish of Rusball in Wilts, T.* 46 *Geo. III.* 452

SEWERS.

1 The commissioners of sewers under statute 28 Hen. VIII. c. 5, must present the lands of levels, &c. to be benefited by sea walls, &c. by juries summoned up on a precept directed to the sheriff, and not him summoned from the body of the county. And where such a jury was by custom summoned by a precept to the sheriff who issued a precept to the clerk to the commissioners, to summon the foreman of a standing jury, summoned by the sheriff at the commencement of every new commission, and all of whom acted for life, or until removed for good cause, within a certain district called a view, and resided there, and were liable to be rated there, and such a jury was summoned to inquire of lands to receive benefit by a sea-wall there erected, such jury being interested, and being also without jurisdiction, their presentment was held absolutely void. The jury presenting must also be sworn in court, and present upon the testimony of witnesses, and where such standing jurymen, were only sworn upon entering on their offices, orappointing a new foreman, it was held bad. Neither is the want of jurisdiction waved by traversing their presentment. The traversing jury must also be of the body of the county. But standing juries may be allowable to assist the view of the commissioners. *Rex* v. *the Commissioners of Sewers for the County of Somerset, M.* 46 *Geo.* 3. 105

SIMONY.

1 The inhabitants of P. having, by endowment and an ancient deed, the right of appointing a curate who is entitled, besides a salary, to the receipt of vicarial tythes, an inclosure act is passed, reciting that it is matter of doubt whether the curate is entitled to small tithes or to a modus in lieu thereof, which question is left unsettled by the act; the inhabitants four years afterwards, present a curate, with whom they enter into an agreement signed by him and the inhabitants stating his appointment, and that

he is entitled to the "payment of 40l. 8s. 2d. annually, payable out of the lands and hereditaments at P. in right of the said curacy, together with surplice fees and all other profits, priviledges and appurtenances to the same belonging and of right payable. The inhabitants considering that sum not sufficient, voluntarily agreed to pay a further annual sum of 29l. 17s. 10d; with a proviso that it shall not in any respect alter the money payment of 40l. 8s. 2d. wherewith the said lands are, and have been immemorially charged in right of the said church. Held, that this agreement gives a benefit to the inhabitants, who make the presentation inasmuch as it bars the right of the curate to his tythes, and affords evidence in future of a modus, and is therefore simoniacal and void, under the statute 31 Eliz. c. 6. s. 5. *The King* v. *the Bishop of Oxford*, T. 46 *Geo.* 3. 570

SLANDER.

See PLEADING, No. 4.

SPECIAL DAMAGE.

See PLEADING, No. 4.

STATUTES.

1 39 Geo. III. c. 69, *See* ACTION UPON THE CASE, No. 1.

2 42 Geo. III. c. 113, *See* ACTION UPON THE CASE, No 1.

3 39 and 40 Geo. III. c. 104, *See* PRACTICE, No. 2.

4 44 Geo. III. c. 108, *See* BANKRUPT, No. 1.

5 39 Eliz. c. 7, s. 11, *See* BANKRUPT, No. 2.

6 43 Eliz. c. 2, 13 and 14 C. II. c. 12, s. 21, *See* POOR, No. 1.

7 41 Geo. III. c. 70, *See* BANKRUPT.

8 1 Jac. I. c. 15, *See* BANKRUPT, No. 4.

9 3 and 4 W. and M. c. 11, s. 3, *See* SETTLEMENT, No. 5.

10 19 Geo. II. c. 32, s. 1, *See* BANKRUPT, No. 5.

11 10 and 11 W. III. c. 28, *See* CONSTABLE, No. 1.

12 4 Jac. I. c. 15, s. 2, *See* BANKRUPT, No. 8.

13 3 and 4 W. III. c. 18, s. 6, *See* POOR, No. 2.

14 43 Geo. III. c. 99, s. 51, 52, 62, 63, *See* PLEADING, No. 7.

15 43 Eliz. c. 2, *See* POOR, No. 3.

16 3 W. and M. c. 11, ss. 2, 3, *See* PLEADING, No. 8.

17 29 Car. II. c. 3, 14 Geo. II. c. 20, *See* EJECTMENT, No. 2.

18 12 Car. II. c. 4, s. 8, *See* INSURANCE, No. 1.

19 7 Geo. I. c. 31, *See* BANKRUPT, No. 1.

20 13 Eliz. c. 7, s. 1, *See* BANKRUPT, No. 2.

21 5 Ann. c. 14, *See* PLEADING, No. 10.

22 2 Geo. III. c. 19, *See* PLEADING, No. 10.

23 13 Geo. III. c. 80, *See* TRESPASS, No 1.

24 17 Geo. III. c. 26, *See* PLEADING, No. 11.

25 23 Geo. III. c. 23, s. 22. *See* JUSTICES, No. 1.

26 23 Geo. I. c. 52, *See* COSTS, No. 3.

STATUTE OF FRAUDS.

See COPYHOLD, No. 1.

STATUTE OF LIMITATIONS.

See COPYHOLD, No. 1.

SUBPŒNA DUCES TECUM.

See ATTACHMENT, No. 1.

SUBSEQUENT EARNINGS OF BANKRUPT.

See BANKRUPT, No. 2.

SUPERSEDEAS.

See PRACTICE, No. 17.
See ERROR, No. 2.

TERM LAST DAY OF.

See PRACTICE, No. 1.

TERMS, NOTICE OF PROCEEDING.

See PRACTICE, No. 6.

TRADE, USAGE OF.

See TROVER, No. 2.

TRADE, OBSTRUCTION OF.

See ACTION UPON THE CASE, No 2.

TRADING.

See BANKRUPT, No. 2,

TRESPASS.

See COSTS, No. 2.

1 Parol order of commitment by justice, until the effect of a warrant of distress for a penalty be known, held

good on statute 43 Geo. III. c. 80, for selling goods on a Sunday. *Still* v. *Wall*, T. 46 Geo. 3 513

2 Grant to one his heirs and assigns, in consideration of a sum of money, of a liberty for him, his heirs and assigns to carry up a sough (or a drain for a colliery) from the bottom of a piece of land of the grantor to an adjoining piece of land of the grantee, and also liberty for him, his heirs and assigns, to make two little sough pits in the said land of the grantor, in a certain place there for the more easy and safe carrying up the tail of the sough one of them to be covered from the top of the intended sough to the surface of the ground, as soon as conveniently may be done, after the making thereof, and the other to be kept open for examining the sough as long as is necessary for that purpose and no longer; held, that the grant of the sough is a continuing grant and the right of orening the sough pit, occasionally, for the necessary repair of the sough, is incident thereto by virtue of the grant. *Hodgson* v. *Field*, T. 46 Geo. 3, 538

TROVER.

1 Where a factor, having a lien upon goods, pledges them to his creditor for a debt without notice of such lien, and without any express intention, at the time of making the lien the subject of pledge, the pawnee of the goods cannot take advantage of this lien, in defence to an action of trover at the suit of the owner.

Semble aliter, if the lien is expressly transferred to the pawnee, and the claim made on that account merely. *M'Combie* v. *Davis*, M. 46 Geo. 3. 3

2 Semble. The courts lean very strongly against the establishment of a lien for a general balance by carriers, as a usage of trade, and where many witnesses were called from distant parts of the country to prove it, and there was no evidence on the other side, and the jury found against the general lien, the verdict was held to be not against evidence, for it did not clearly fix the party with the knowledge of such usage. *Rushforth and another* v. *Hadfield and others*, H. 46 Geo. 3. 221

TRUST.

See COPYHOLD, No. 1.

TOWNSHIP.

See SETTLEMENT, No. 1.

VENDOR AND PURCHASER.

See AUCTION, No. 1.

UNITED PARISHES.

See POOR, No. 1.

WARRANTY.

See PLEADING, No. 5.
See INSURANCE, No. 2.

WATER-MILL.

See DEMISE, No. 1.

WEAR.

See NUISANCE, No. 1.

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